TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted] 1923

No. [redacted]85

BENJAMIN N. FORD, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 22, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 9, 1922.

(29,045)

(29,045)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 495.

BENJAMIN N. FORD, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

UDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1923.

1 The District Court of the United States, Southern District of Ohio, Western Division.

No. 1680.

INDICTMENT FOR —.

Act of August 10, 1917, especially sections 1, 2, 3, 4 and 25 thereof, and the Executive Order of the President of the United States, dated August 23, 1917. A true bill. G. V. Thompson, Foreman Grand Jury. Filed November 7, 1919.

SOUTHERN DISTRICT OF OHIO,
Western Division, ss:

Of the October Term, in the Year Nineteen Hundred and Nineteen.

First Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Western Division of the Southern Judicial District of Ohio, at the October Term thereof, in the year nineteen hundred and nineteen, and inquiring for that division and district, upon their oaths present:

That by reason of the existence of a state of war, it was essential to the national security and defense, for the successful prosecution of the war, and for the support of the army and navy, to secure an adequate supply and distribution, and to facilitate the movement of certain things the said Act called "necessaries," which said things so denominated in said act as "necessaries" included fuel; and to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting the supply, distribution and movement of such "necessaries," including fuel; and to establish and maintain governmental control of such "necessaries," including fuel, during the war, the Congress

2 of the United States (by an Act approved August 10, 1917, commonly known as "The National Defense Act" and especially Sections 1, 2, 3, 4 and 25 thereof authorized the President to make such regulations and to issue such orders as were essential to carry out the provisions of said act and whenever in his judgment the same was necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic and foreign, excepting that the regulations and prices so fixed and published should not be construed as invalidating any contract in which prices were fixed, made in good faith, prior

to the establishment and publication of such prices and regulations. That pursuant to the provisions of the Act above referred to and under its authority, the President of the United States on August 23, 1917, issued an Executive Order establishing and regulating the prices and margins of coal jobbers to apply to the intrastate, interstate and foreign commerce of the United States in which said Executive Order it was provided, among other things, that

"1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

"2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 pounds."

That during the months of September, October and November, 1917, The Matthew Addy Company, was, and still is, a corporation organized and existing under the laws of the State of Ohio, and was, in the City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, engaged in and conducting business as a coal jobber as defined in said Executive Order; and that Benjamin N. Ford, late of the said City of Cincinnati, County of Hamilton and State of Ohio, during all of said times, was and still is, the Vice-president of said The Matthew Addy
3 Company, and in such official capacity had charge, control, supervision and direction of the activities, negotations and contracts of said company insofar as they related to the conduct of its business as a coal jobber; that continuously during the said months of September, October and November, 1917, a state of war existed between the United States Government and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect.

The said grand jurors further present that on or about the tenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-president, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.30 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton and which said profit or margin of Twenty-five (25c) Cents per ton was,

and was well known by said Benjamin N. Ford, Vice President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

4 Second Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 42.35 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the

price for the purchase and sale of said coal was fixed, which
5 fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Abby Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words ,"and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 51.25 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted
6 by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three
7 Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fifth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and

being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously

8 did ask, demand and receive from The Wagner Manufacturing Company, a corporation doing business in Sidney, Shelby County, Ohio, for a certain quantity of bitumious coal, to-wit, about 56.5 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c.) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The Wagner Manufacturing Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Sixth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

9 The said grand jurors further present that on or about the seventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing

business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from The Wagner Manufacturing Company, a corporation doing business in Sidney, Shelby County, Ohio, for a certain quantity of bituminous coal, to-wit, about 45.6 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said The Wagner Manufacturing Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Seventh Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the twenty-sixth day of August, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, willfully, unlawfully, knowingly and feloniously did ask, demand and receive from Rice & Laub, doing business in Batavia, Clermont County, Ohio, for a certain quantity of bituminous coal, to-wit, about 46.85 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal,

which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Rice and Laub, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

11 Eighth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as-if fully written herein.

The said grand jurors further present that on or about the eighth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Rice & Laub, doing business in Batavia, Clermont County, Ohio, for a certain quantity of bituminous coal, to-wit, about 49.70 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber;

and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Rice and Laub, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said
12 coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Ninth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated herein by this reference as if fully written herein.

The said grand jurors further present that on or about the twelfth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Connersville Lumber Company, doing business in Connersville, Fayette County, Indiana, for a certain quantity of bituminous coal, to-wit, about 57.15 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin
13 of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Connersville Lumber Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Tenth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Consumers Coal and Supply Company, doing business in Elkhart, Elkhart County, Indiana, for a certain quantity of bituminous coal, to-wit, about 49.6 tons of 2,000 pounds each of Pocahontas run of mine coal, a price
14 of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Consumers Coal and Supply Company, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Eleventh Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts,

conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the thirteenth day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as
15 aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Consumers Coal and Supply Company, doing business in Elkhart, Elkhart County, Indiana, for a certain quantity of bituminous coal, to-wit, about 51 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal job'er, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said job'er; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Consumers Coal and Supply Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Twelfth Count.—Act of August 10, 1917, Especially Sections 1, 2, 3, 4 and 25 Thereof, and the Executive Order of the President of the United States dated August 23, 1917.

And the grand jurors aforesaid, upon their oaths aforesaid, charge said The Matthew Addy Company, as aforesaid, with all the facts, conditions and things and knowledge of all the facts, conditions and things as set forth in the first count hereof beginning with the words "That by reason of the existence of a state of war," on the first page hereof, and ending with the words, "and the law, orders and regulations above referred to were in full force and effect" on the third page hereof, the same being hereby made a part of this count
16 and being thus fully incorporated hereby by this reference as if fully written herein.

The said grand jurors further present that on or about the eleventh day of September, in the year nineteen hundred and seventeen, in the said City of Cincinnati, County of Hamilton and State of Ohio, and within the jurisdiction of this Honorable Court, said Benjamin N. Ford, acting in his capacity of Vice-President, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from the Whetstone Coal Company, doing business in Cincinnati, Hamilton County, Ohio, for a certain quantity of bituminous coal, to-wit, about 42.7 tons of 2,000 pounds each of Pocahontas run of mine coal, a price of Three Dollars and Fifty ($3.50) Cents per ton, F. O. B. at the mines producing said coal, which said price of Three Dollars and Fifty ($3.50) Cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of Twenty-five (25c) Cents per ton was, and was well known by said Benjamin N. Ford, Vice-President, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of 15 cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Whetstone Coal Company, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed, which fact was well known to the said Benjamin N. Ford, Vice-President of said The Matthew Addy Company, as aforesaid.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. Stuart R. Bolin, United States Attorney, S. D. O.

17 **MOTION TO QUASH INDICTMENT.**

[Filed December 26, 1919.]

Comes now defendant, Benjamin N. Ford, by his attorney, and moves the court to quash the indictment and each and every one of the several counts contained therein, because of the following defects apparent upon the face of the record.

1. Said indictment and each of its several counts is insufficient in law and fact.

2. Said indictment and each of its several counts charges in each count several separate and distinct alleged offenses and is bad for duplicity.

3. Said indictment and each of its several counts charges no indictable offense under the laws of the United States.

4. That the averments in said indictment as to the form of same and the manner in which said offense is charged, are so vague, indefinite, uncertain, argumentative and misleading that the defendant is not properly informed of the charge against him or what he shall meet at the trial and can not prepare his defense.

5. That the indictment is not in the form of nor does it conform to the Act of Congress alleged to have been violated.

6. Other defects apparent upon the record. Nelson B. Cramer, Attorney for Defendant, Benjamin N. Ford.

18 **OPINION ON MOTION.**

[Filed February 26, 1920.]

PECK, *District Judge:*

On motion to quash the indictment.

Identical questions are presented in each case.

The indictment is not multifarious. The offense is charged by the allegations of fact, not by the references to laws. The latter are surplusage.

The indictment is sufficient. The word "may" in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. United States vs. Lexington Mill Co., 232 U. S., 399. And that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise.

The authority of the Commission under the thirteen paragraph of the section is to fix local prices only after direction by the President to make the investigation authorized by the eleventh paragraph. The grant of powers to the Commission is contingent and does not become effective until that direction is given. Such grant does not, therefore, require the construction of the first paragraph, to the effect that the President can act only through the Commission, for which the defendant contends. United States vs. Pennsylvania Central Coal Co., 256 Fed., 703.

For the Government: Stuart R. Bolin, United States Attorney; Allen C. Roudebush, Assistant United States Attorney. For the Defendants: Nelson B. Cramer, Julius R. Samuels.

19 **ORDER OVERRULING DEFENDANT'S MOTION.**

[Filed June 4, 1920.]

This cause coming on to be heard upon defendant's motion to quash the indictment was argued by counsel and submitted to the court, upon consideration whereof the court found that said motion is not well taken and overruled the same on February 26, 1920, to which defendant excepts. And it is ordered that this entry be made as of February 26, 1920. Peck, J.

DEMURRER TO INDICTMENT.

[Filed February 28, 1920.]

Comes now defendant, Benjamin N. Ford, by his attorney and demurs to the indictment and each of its several counts contained therein for the following reasons, to-wit:

1. That the Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator, are indefinite, uncertain, and misleading and do not clearly describe an offense.

2. The Act of Congress and the rulings, regulations, etc., are unconstitutional for the following reasons, to-wit:

a. They violate the fifth amendment to the Constitution of the United States, in that defendant is deprived of its property without due process of law.

20 *b*. They violate the sixth amendment to the Constitution of the United States, in that defendant is not informed of the nature of the accusation.

c. They violate the tenth amendment to the Constitution of the United States in that they interfere with the rights of the respective states, as to regulation of industries within those states.

d. The Act of Congress of August 10, 1917, violates Section 1 of Article 1, Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

e. The Act of Congress violates clause 1 of Section 8 of Article 1 and clause 11 of Section 8, of Article 1 of the Constitution of the United States in that, it is an abuse of the power given to Congress to provide for the national security and defense.

f. The ruling of the President of the United States under date of October 6th, 1917, violates clause 3 of Section 9 of Article 1 of the Constitution of the United States in that it is an ex post facto law. Nelson B. Cramer, Attorney for Defendant, Benjamin N. Ford.

OPINION ON DEMURRER.

[Filed May 29, 1920.]

PECK, *District Judge:*

On demurrer to indictment.

The principal question raised is whether Section 25 of the
21 National Defense (Lever) Act, authorizing the President to fix the price of coal during the continuance of the war is constitutional as depriving of property without due process of law.

While the war created no new powers in Congress it undoubtedly required the exercise of powers latent in times of peace. McKinley vs. U. S., 249 U. S., 397. The right to regulate business, including

the fixing of prices for essential commodities, in furtherance of a constitutional power of the United States, exists when the business sought to be regulated is one in which the public has an interest beyond that of the persons who participate in the individual transactions therein. Munn vs. Illinois, 94 U. S., 133. Businesses which are purely private in times of peace may become matters of vital public concern in times of war. The late war was a marshaling not only of the man-power of the nations engaged, but of their total resources and economic strength. The production and distribution of coal, the chief source of industrial energy, was a business in which the public had a vital interest over and above that of the individuals engaged in the particular transactions; therefore, it was a business which Congress had the right to regulate.

It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined, under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. Chicago, Milwaukee & St. Paul Ry. vs. Minnesota, 134 U. S., 418; Minnesota Rate Cases, 230 U. S., 352-434; Oklahoma Operating Co. vs. Love, — U. S., —, decided March 22, 1920; Tolter Hardware Co. vs. Boyle, 263 Fed., 134.

But due process of law is not to be tested by form of procedure merely (Cooley, Const. Lim. 7th Ed., p. 503) and varies with the subject-matter and necessities of the situation. Public danger warrants the substitution of executive process for judicial process. Moyer vs. Peabody, 212 U. S., 78. During the war, when the marshaling of the industrial powers of the nation was imperative, prompt action was demanded and extended investigations such as are necessary to judicial review of the economic orders essential to the prosecution of the war were impractical and impossible. And, under the circumstances then existing, the fixing of prices in public industries necessary for the prosecution of the war, by the President under the authority of the Act of Congress, was not the deprivation of due process of law; nor was the reposing of such power in the President unconstitutional as a delegation of either legislative or judicial power. U. S. vs. Penn. Central Coal Co., 256 Fed., 703.

Demurrer overruled.

For the Government: James R. Clark, Allen C. Roudebush; for Defendants: Nelson B. Grames, Julius R. Samuels.

ORDER OVERRULING DEFENDANT'S DEMURRER TO THE INDICTMENT.

[Filed June 4, 1920.]

This cause coming on to be heard upon the demurrer of defendant was argued by counsel and submitted to the court, upon consideration whereof the court found that said demurrer is not well taken and overruled the same on May 29, 1920, to which defendant excepted. And it is ordered that this entry be made as of May 29, 1920. Peck, J.

23 **MOTION FOR A NEW TRIAL.**

[Filed June 5, 1920.]

Defendant moves the court to set aside the verdict and discharge defendant, or grant a new trial, upon the following grounds:

1. The verdict against him on each count of the indictment on which he has been found guilty, to-wit, counts 1, 5, 7, 8, 9, 10 and 12 is not sustained by sufficient evidence and is contrary to law and the evidence.

2. The court erred in refusing to give to the jury each of the charges requested by the defendant and refused.

3. The court erred in its general charge to the jury.

4. The court erred in excluding evidence offered by the defendant.

5. The court erred in admitting evidence on behalf of the Government over objection of the defendant.

6. The court erred in overruling defendant's motion at the close of the Government's evidence to dismiss the cause and discharge defendant.

7. The court erred in overruling defendant's motion at the close of all the evidence to dismiss the cause and discharge defendant.

8. Other errors of law occurring at the trial, and excepted to by defendants. Nelson B. Cramer, Joseph S. Kraydon, Julius R. Samuels, Attorneys for Defendant.

24 **RULING ON MOTION FOR NEW TRIAL.**

[Filed June 23, 1920.]

PECK, *District Judge:*

On motion for new trial.

It is urged that the court gave retroactive effect to the President's order of August 23, 1917, fixing the jobber's commission, in that, whereas the order prescribes that for the buying and selling of bituminous coal a jobber shall not add more than fifteen cents to his purchase price, the defendant was convicted for having, after the promulgation of that order, added a margin in excess of that prescribed with respect to coal which it had contracted for prior to the date of the order. The argument presented is that the defendant had a vested interest in its contract of purchase, and that the regulation is not to be so construed as to effect the same unless such clearly appears to be the intention. But does it not clearly so appear?

The preamble of the Lever Act declares that by reason of a state of war, it is essential for the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, and to prevent scarcity, manipulation and hoarding of coal, and injurious speculation, manipulation and private controls affecting such supply, distribution and

movement, and to establish and maintain, during the war, control of coal, among other necessities therein enumerated. The objects to be accomplished were of immediate urgency. It was not a permanent policy that was being instituted, but prompt and extraordinary action for the national defense. To effect the same the President was given authority, by Section 25, to fix the price of coal wherever and whenever sold.

The act took effect upon August 10, 1917, and eleven days later the President promulgated a general scale of prices at the mines, for bituminous coal, and almost immediately thereafter, August 23, issued a further proclamation fixing the prices for anthracite coal, and, as a part thereof, promulgated the regulation in question relating to jobbers' margins. The order stated that the margins therein referred to should be in force pending further investigation.

25 It is well known, and if it were not so it is recognized in certain orders of the Fuel Administration (see order November 8, 1917, General Orders, p. 448), that the coal mine output was largely contracted to be sold in advance. Coal not under contract was spoken of as "free coal." (Order of October 6, 1917, Id., 445.) By the 25th section of the act existing contracts for future delivery were saved. The supply of coal was, therefore, to a large extent, contracted for by jobbers, and in their hands, so to speak, at the time the act was passed. Unless jobbers' margins with reference to then existing contracts were regulated, it remained open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the act was designed to prevent. Reading together the Act of Congress and the presidential orders designed to carry out the purpose thereof, it does not seem open to doubt that it was the intention of the President to control and prevent speculation in the commodity so far as possible, not merely to fix prices for mine operators and permit those jobbers who held contracts for the mine output to be free from all restriction in the disposition of the same.

As to the vested interest of the jobber in his contract, it was not greater than that of the mine-owner in his coal, mine and equipment. The construction of the order contended for would discriminate as against the mine-owner and in favor of the jobber. It would be, in short, to say that the President had regulated the mine operator's price but left the jobber without limit as to price or profit on coal held by contract. Such a construction would violate the obvious purpose of the act.

Should the indictment have averred that the margin charged was for the buying and selling of the coal? The indictment alleges that the defendant, in its capacity as a coal jobber (viz., one who bought and sold), asked, demanded and received a price f. o. b. the mines producing said coal (which, of itself, would preclude the possibility of the defendant's having paid transportation charges), a price per ton which included a profit or gross margin to it, as such coal jobber (in other words, a "jobber's commission"—see orders of October 6, 1917), of twenty-five cents per ton, which profit or margin was, and was well

known to the defendant to be, in excess of that permitted by
regulation, which regulation defining a jobber's margin is
26 forth in the indictment. The phrase "profit or gross mar
to it as a coal jobber" may be fairly assumed to be syno
mous with "jobber's commission" as used in the subsequent ord
of the Fuel Administration, and by the regulation would be defi
as that sum allowable to a jobber for the buying and selling of c
It would, therefore, seem that the indictment charges a violation
the regulation (which violation is, by the 25th section of the L
Act, made an offense), in words which would render it certain, ti
truth being found, that the defendant is guilty, and which inform
the defendant definitely of the accusation to be met; and, judgm
having been rendered thereon would suffice to protect the defend
against another indictment for the same acts. More is not requi
Motion overruled.

For the Government: Allen C. Roudebush, Assistant United St
Attorney; for the Defendants: Nelson B. Cramer, Julius R. Samu
Joseph S. Graydon.

ENTRY OVERRULING MOTION FOR NEW TRIAL.

[Filed June 23, 1920.]

This case coming on to be heard upon a motion of the defend
for new trial, and the court being fully advised in the premises, fi
that said motion is not well taken.
Therefore, it is hereby ordered, adjudged and decreed, T
27 said motion be overruled, to all of which said defendant
cepts. Peck, Judge United States District Court, S. D.

MOTION IN ARREST OF JUDGMENT.

[Filed June 23, 1920.]

The defendant, Benjamin N. Ford, moves the court to arrest ju
ment as to each of the counts of the indictment upon which he
been found guilty, to-wit, counts 1, 5, 7, 8, 9, 10 and 12, upon
following grounds:
1. The matters and things set forth and charged do not consti
an offense against the laws of the United States.
2. The provisions of the Act of Congress of August 10, 1917,
Stat., 276, known as the National Defense (Lever) Act, and especi
Sections 1, 2, 3, 4 and 25 thereof, and the promulgation of the o
of the President issued August 23, 1917, and especially Section
and 2 thereof, are, as construed and applied by the judgment of
court, unconstitutional and void, in that they attempt to cr
offenses and impose penalties repugnant to the Constitution of
United States, especially Section 1 of Article 1, Section 1 of Artic
and Section 1 of Article 3; and to the provisions of the 5th ame
ment that no person shall be deprived of life, liberty or prop

without due process *fo* law; and to the provision of the 6th amendment that in all criminal cases the accused is entitled to be informed of the nature and cause of the accusation against him; and to the 10th amendment reserving to the States, or to the people thereof, powers not delegated to the United States; and to Clause 1 of
28 Section 8 of Article 1, and Clause 11 of Section 8 of Article 1 of the Constitution of the United States.

3. The averments of each of said counts are too general, vague, uncertain and indefinite to state an offense, or to inform defendant of the nature and cause of the accusation or to apprise him, with such reasonable certainty of the offense with which he is charged, and which he may be expected to meet on a trial, as to enable him to make his defense.

4. Each of said counts undertakes to charge separate and distinct offenses, and is bad for duplicity.

5. Upon certain of said counts, conviction was had for acts committed outside the jurisdiction of the court. Nelson B. Cramer, Joseph S. Graydon, Julius R. Samuels, Attorneys for Defendant.

ENTRY OVERRULING MOTION IN ARREST OF JUDGMENT.

[Filed June 23, 1920.]

This case coming on to be heard upon a motion in arrest of judgment filed by the defendant, and the court being fully advised in the premises, finds said motion not to be well taken.

Therefore, it is hereby ordered, adjudged and decreed, That said motion be overruled, to all of which said defendant excepts. Peck, Judge United States District Court, S. D. O.

28a

VERDICT.

[Filed June 2, 1920.]

We, the Jury, herein do find the defendant, Benjamin N. Ford, guilty in manner and form as charged in the 1, 5, 7, 8, 9, 10, 12, counts of said indictment, and not guilty as charged in the remaining counts thereof. (Signed) J. C. Rodgers, Foreman.

SENTENCE.

[Entered June 24, 1920.]

This day came the District Attorney on behalf of the United States and the defendant Benjamin N. Ford being present in court.

Thereupon, the District Attorney moving for sentence the court pronounced the following sentence, to-wit: That the said defendant pay a fine of One Thousand ($1,000.00) Dollars and the costs of this prosecution to be taxed and that he remain imprisoned in the jail of Hamilton County, Ohio, until said fine and costs are paid or until he is otherwise discharged by law.

It is further ordered by the court that the said sentence be stayed pending the allowance and disposition of a writ of error herein, upon the defendant giving a bond in the sum of Two Thousand, Five Hundred Dollars ($2,500.00) with sureties to be approved by the Clerk of this court, conditioned for his appearance before this court from day to day as may be required pending the allowance and disposition of a writ of error herein and from day to day thereafter as the court may direct and not depart the court without the leave thereof.

Thereupon came the defendant and executed his bond in the sum of Two Thousand, Five Hundred ($2,500.00) Dollars with James A. Green and Robert M. Green as sureties and was released from custody.

29 **RECOGNIZANCE FOR APPEARANCE.**

[Filed June 24, 1920.]

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Be it remembered, That on this 24th day of June, A. D. 1920, before me, B. E. Dilley, Clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came, Benjamin N. Ford as principal and James A. Green and Robert M. Green, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of Twenty-five Hundred ($2,500) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such, that if the said Benjamin N. Ford shall personally appear before the District Court of the United States, in and for the District aforesaid, at Cincinnati, Ohio, from day to day as may be required pending the allowance and disposition of a writ of error in the case of the United States vs. Benjamin N. Ford, No. 1680, said defendant having been sentenced by the court in said case to pay a fine of $1,000 and costs of prosecution and to stand committed until said fine and costs are paid, and then and there to abide said judgment and sentence in the event said judgment and sentence is sustained, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue. Benjamin N. Ford. James A. Green. Robert M. Green.

Taken and acknowledged before me on the day and year first above written. B. E. Dilley, Clerk U. S. District Court, Southern District of Ohio, by Harry F. Rabe, Deputy. (Seal.)

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, James A. Green, one of the sureties above named, do
30 solemnly swear that after paying my just debts and liabilities,
I am worth Twenty-five Thousand ($25,000) Dollars in real
estate in my own name, situate in the County of Hamilton in said
District. James A. Green.

Sworn to before me the 24th day of June, 1920. Harry F. Rabe,
Deputy Clerk U. S. District Court, S. D. O.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Robert M. Green, one of the sureties above named, do solemnly
swear that after paying my just debts and liabilities, I am worth
Twenty Thousand ($20,000) Dollars in real estate in my own name,
situate in the County of Hamilton in said District. Robert M.
Green.

Sworn to before me the 24th day of June, 1920. Harry F. Rabe,
Deputy Clerk U. S. District Court, S. D. O.

31 **BILL OF EXCEPTIONS.**

Trial before Hon. John W. Peck and a jury, at Cincinnati, beginning June 1, 1920.

Appearances: Allen C. Roudebush, Assistant U. S. Attorney, for the Government; Nelson B. Cramer, Julius R. Samuels and Joseph S. Graydon for defendant.

Tuesday Afternoon, June 1, 1920.

Court met pursuant to adjournment, all counsel being present as noted.

The Court: Which one of these cases is to be tried first, Mr. District Attorney?

Mr. Roudebush: Matthew Addy case.

The Court: United States of America vs. The Matthew Addy Company. Is defendant ready?

Mr. Cramer: I understood the cases were to be tried together.

Mr. Roudebush: That is satisfactory.

The Court: That could only be done of course by agreement of counsel.

Mr. Roudebush: I agree to it, Your Honor.

Mr. Cramer: It is agreeable, yes.

The Court: That is, both cases may be tried upon the same evidence at the same time, simultaneously?

Mr. Cramer: In so far as the indictments apply against each one. There are twenty-three counts against the company and eleven against the individual.

The Court: Of course, separate verdicts will be rendered in each case, so they will be separate simultaneous trials.

Thereupon, after a jury had been duly impaneled and sworn, the trial proceeded as follows:

The Court: The Government may state its case.

Mr. Roudebush: If Your Honor please, and gentlemen of the jury, the Government expects the evidence to show that The Matthew Addy Company, a corporation doing business in this city, was a jobber and handled this coal in question as a jobber, without physically handling same; that The Matthew Addy Company, on or about, or, in fact, on the 31st day of July, 1917, made a contract with the Bluefield Coal & Coke Company, of Bluefield, West Virginia, in which they purchased coal at three dollars and twenty-five cents per ton at the mines; that this company, without phys-

32 ically handling this coal, sold this coal to different parties set forth in the twenty-three counts, part to each of twenty-three different persons. The defendants have offered and agreed that they would admit and stipulate that the coal was sold to these parties as set forth in the indictment, at the charge, which is all the same in each one, of three dollars and fifty cents a ton, and that they had no contract to sell to these twenty-three different parties——

Mr. Cramer: If the court pleases, we are admitting the naked sale of this coal at three dollars and twenty-five cents—three dollars and a half, not any other——

Mr. Roudebush: Mr. Cramer, I asked you just before the jury was sworn——

Mr. Cramer: If the court please, if there is any controversy I would ask that the jury be dismissed, and not have any controversy as to veracity between counsel in their presence.

The Court: Is it admitted that the coal set forth in the several counts of both indictments was sold at the prices and in the quantities and on the dates therein set forth?

Mr. Cramer: That is all we have admitted.

The Court: That is admitted?

Mr. Roudebush: That is what I stated.

The Court: That is the extent of the admission, as I understand it.

Mr. Roudebush: And that the Matthew Addy Company is a corporation?

Mr. Cramer: Certainly.

Mr. Roudebush: Your Honor, do they admit that the coal was sold on the dates that we set forth in the indictments to the parties and at the price?

The Court: That is the admission in each case, in each of the several counts. I am correct, am I not, Mr. Cramer?

Mr. Cramer: Yes, sir.

Mr. Roudebush: Gentlemen of the jury, the evidence will show, as I started to say, that this coal was purchased on the 31st day of July, of the Bluefield Coal & Coke Company of Bluefield, West Virginia, for three dollars and twenty-five cents a ton; that it was sold to the different parties set forth at three dollars and a half a ton, being a commission of fifty cents a ton——

Mr. Cramer: Twenty-five cents.

Mr. Roudebush: Twenty-five cents a ton.

A Juror: What do you mean?

33 Mr. Roudebush: A profit of twenty-five cents a ton, that they charged a commission of twenty-five cents a ton when the regulation said they could only charge fifteen cents.

Mr. Graydon: Now, if Your Honor please, that is not a correct statement of any regulation that could be introduced in evidence. I don't know how to meet the effort of the Government to state what everybody knows they can't prove. If that statement is to stand before the jury I would like the District Attorney——

The Court: What is the statement you object to?

Mr. Graydon: He says he has some regulation which says they could not charge a commission of more than twenty-five cents.

Mr. Roudebush: Gross margin.

Mr. Graydon: No such regulation can be produced. The regulation which is relied on is set forth in the indictment.

The Court: It is set forth in the indictment.

Mr. Graydon: Then why state it?

The Court: The defendants may state the defense.

Mr. Graydon: If Your Honor please, I would like Your Honor to require the Government to state the offense which is proposed to be proven, with the possibility that if he fails to state any offense we won't have to state any defense.

The Court: Well, for the sake of exactness, will you please read that Presidential order to which you refer, Mr. Roudebush?

Mr. Roudebush: The part of it as set forth in the indictment I think covers the point.

(Reading:) "A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

"For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds, nor shall the combined gross margin of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2,000 pounds."

Mr. Graydon: Now, Your Honor, the District Attorney has stated what the regulation is, and I would now like to have him required to state what he proposes to prove as a violation of the regulation.

The Court: I believe he stated that the coal was purchased

34 at $3.25 a ton, and proposed to show it was sold at $3.50 a ton, as I understand it, and that, coupled with the allegation that he makes that the defendants were then and there coal jobbers, is the

statement upon which the Government relies. Let the defense be stated.

Mr. Cramer: If the court please——

The Court: Mr. Cramer.

Mr. Cramer: and gentlemen of the jury, the defendants in this case have been indicted under what is known as the "profiteering" law, the Lever Act, passed by Congress August 10, 1917. The Government has just stated its case, that we have violated the President's promulgation or order of August 23, which states that the gross margin allowed in any single transaction shall be fifteen cents. The indictment doesn't agree with the Government's statement of what it expects to prove. The indictmnet states that Benjamin N. Ford—referring to Mr. Ford's indictment and not the corporation—acting in his capacity as vice-president, as aforesaid, of said The Matthew Addy Company, doing business as a coal jobber, as aforesaid, wilfully, unlawfully and knowingly and feloniously did ask and demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.3 tons of 2,000 pounds each of Pocahontas Run-of-Mine coal, a price of $3.50 per ton, f. o. b. the mines producing said coal, which said price of $3.50 per ton included a profit or gross margin to it.

Now Mr. Roudebush has not accused, in his preliminary statement of the case, that we have made a profit.

Mr. Graydon: Yes, he did say that.

Mr. Cramer: I mean in reading the promulgation of the President. In his preliminary statement he said we are charged in this indictment with having made a gross profit—a profit, not gross or net or otherwise, of more than fifteen cents a ton—as such coal jobber as aforesaid, of twenty-five cents a ton—included a profit or gross margin, referring again to the exact phraseology of the indictment—that $3.50 a ton included a profit or gross margin to it, the said The Matthew Addy Company, as such coal jobbers as aforesaid, of twenty-five cents per ton, and which said profit or margin of twenty-five cents per ton was, and was well-known to said Benjamin N. Ford, vice-president, as aforesaid, of said The Matthew Addy Com-
35 pany, to be in excess of the profit or gross margin of profit of fifteen cents per ton of 2,000 pounds permitted by law, executive order or regulations above referred to.

The Lever Act is the profiteering law, and the State has stated they expect to prove we made a profit in excess of the fifteen cents allowed by the promulgation of August 23rd.

We expect to prove that this coal—and as has been stated by Mr. Roudebush in his opening statement—was purchased by a contract dated July 31, 1917, which was more than a month prior to the enactment of the Lever Act, which was enacted by Congress under date of August 10, 1917. That act specifically exempted from its control or influence any contract—it didn't say contract of purchase and contract of sale; it says "any contract." And I wish to refer to the act.

Mr. Roudebush: Your Honor, I object to this line of opening

statement, because it is a question of interpretation of the law, and I don't think it is proper because the interpretation of the law upon which this indictment is based is that it must be both sold—must be a contract for both sale and purchase. It seems to me we ought to know where we are on that, to start with.

The Court: Of course, the statement to the jury is a statement of the facts that you expect to prove. However, if counsel desire to call the court's attention to any matters of law to be considered they may do so.

Mr. Cramer: That is absolutely so. I am repeating, as I thought, what Mr. Roudebush had just referred to as proof for the admission that this coal was purchased under contract dated July 31, 1917.

The Court: I am inclined to think the consideration of the law should be——

Mr. Cramer: I will try and refrain from a consideration of the law.

The Court: Very well.

Mr. Cramer: We expect to prove that at the time of the purchase of this coal under date of July 31, 1917, there was a quasi-official agreement between the Government of the United States, as represented by Secretary of Interior Lane——

Mr. Roudebush: Your Honor, I object to this.

The Court: Well, counsel may state what he expects to prove. I can't pass on it all in advance.

36 Mr. Cramer: —and at that time, and under that agreement, which is known as the Lane-Peabody Agreement, the commission, the gross commission of jobbers of coal was fixed at twenty-five cents per ton; that the memorandum of the purchase of this coal under date of July 31, 1917, was by Mr. Ford, as manager of the department of coal sales and purchases, was sent to the different branch offices of The Matthew Addy Company, and to the different salesmen selling coal for The Matthew Addy Company, with a notation that under the Lane-Peabody Agreement we can add twenty-five cents a ton to the purchase price.

We expect to show that a part of the coal purchased from the Bluefield Coal & Coke Company was sold between the date of its purchase and August 23rd, at which time the President fixed the commission allowed to coal jobbers, and that after that time the balance of this coal was sold.

The third defense or point that we will prove is that the fifteen cents allowed by the President under his proclamation of August 23rd would not have equalled the selling price to the Matthew Addy Company——

Mr. Roudebush: I object.

Mr. Cramer: —the costs of the sales——

The Court: Counsel may state his defense. The questions of admissibility of evidence will be considered later, Mr. Roudebush.

Mr. Cramer: If the court please, I would like to answer the Government's argument on that.

The Court: You may proceed with your statement of the facts, Mr. Cramer.

Mr. Cramer: As I have stated, we expect to prove that the fifteen cents allowed under the President's promulgation of August 23, 1917, was not a sufficient amount to cover the actual cost of selling the coal purchased under date of July 31st, by which I mean that if the sale of this coal was controlled by the Lever Act and we had only added fifteen cents to the purchase price of that coal that there would have been an actual monetary loss sustained by The Matthew Addy Company.

That is sufficient.

The Court: The Government may call its evidence.

Mr. Cramer: Mr. Roudebush, do you want a stipulation?

Mr. Roudebush: Yes.

37 The Court: You might cover this matter of sales by a stipulation to start with.

(Thereupon counsel for the government confers with counsel for defendants.)

Mr. Graydon: If there is any misunderstanding about what it was I suppose the Government can produce its case, if counsel can't agree what their verbal understanding was.

The Court: Does the stipulation cover the place of sale?

Mr. Roudebush: I think so, Your Honor.

(Thereupon counsel for both sides again confer.)

Mr. Graydon: I don't think the Government will contend that any counsel on this side ever agreed to admit anything that was not alleged in the indictment. If I am mistaken about that I would like to be advised about it.

Thereupon the following stipulation was entered into between counsel for both sides:

It is hereby stipulated between counsel for the Government and the defendants that the coal in the several counts of each indictment was sold to the parties mentioned in each count, respectively, at the date and price and in the amount set forth in each count of said indictments, and that The Matthew Addy Company is a corporation organized under the laws of the State of Ohio.

The Court: Now, the stipulation does not cover the place of sale, do I understand?

Mr. Graydon: No.

The Court: Does the indictment show it was done in this district in each case?

Mr. Roudebush: Yes, Your Honor, in the City of Cincinnati, Hamilton County, State of Ohio, within the jurisdiction of this court.

Mr. Graydon: Well, I think there would be no evidence to sustain that allegation, if Your Honor please. We can't admit it.

Mr. Roudebush: No, there won't be any evidence, because that was the understanding.

Mr. Graydon: There was no understanding. The indictment itself shows it was shipped from the mine outside of the jurisdiction

of this court to a purchaser in Chicago, Illinois, outside of this jurisdiction; and the allegation is that Ford, within the jurisdiction,
did wilfully, unlawfully, knowingly, and feloniously ask,
38 demand and received a certain amount of money. Now, the facts, if developed, will show that the sale was made at the Chicago office, so we can't accede to any stipulation of that kind. I am just making that statement because I don't want it suggested that we are going back on any agreement with him.

Mr. Roudebush: Your Honor, under the circumstances I would like to have this case continued until we can get our witnesses here. Counsel for defendants—it was their proposition, and they asked us, said they wouldn't dispute the sales as charged in the indictment, and for that reason I did not subpœna any witnesses except one witness, as a mere form. Now they come in court and say they agree to admit the sales but they don't admit that the sales were made in this jurisdiction. Their office, their place of business is here, and it seems to me it is no more than fair that we have an opportunity to produce our witnesses and as we would have produced our witnesses had we not come to the proposition of admitting these things in order to save the Government money. That is the only reason why we did not go into that matter.

Mr. Graydon: There wasn't any agreement, Your Honor, made by any counsel on behalf of the defendants in this case, except as has been stated, that in order to save the time of the court and expedite the trial of this case that we would concede such and such amounts of coal were sold to the respective individuals named in the different counts; that the prices at which they were sold were as stated in those counts, respectively, and that the amounts were as stated in those counts. It is impossible, if Your Honor please, that counsel could have conceded that these sales were made in this jurisdiction, because by so doing they would have made a concession contrary to the facts in respect to many of the counts; in fact, as to some of them the sales were made here, but I am indicating that to your Honor to rebut any suggestion that we made any agreement in regard to that matter. We did not expect to be found guilty or defend against the counts in which the proof showed that the court had no jurisdiction in regard to the offense, if any.

Mr. Cramer: If we had agreed to it the court wouldn't have had jurisdiction.

Mr. Graydon: I was going to suggest, if Your Honor
39 please, that in view of the fact there are certain counts in which the evidence would establish that the sales were made here, we have no objection to proceeding on one or more of those counts. We make no concession or admission in regard to any count in which the sale occurred or in which the money was demanded and received outside the jurisdiction of the court.

The Court: Will you specify those counts? Are you willing to specify those counts?

Mr. Graydon: I think that Mr. Cramer and Mr. Roudebush can pick them out.

The Court: Well, you might do that. We will take a few min-

utes recess, gentlemen of the jury, while the counsel are conferring about this matter.

After a short recess the jury were returned into the jury box and the trial proceeded as follows:

The Court: What is the situation, gentlemen?

Mr. Graydon: Well, defendant is ready to proceed with the trial, Your Honor.

Mr. Roudebush: Your Honor, I would like to ask a continuance to the latter part of this week.

The Court: You mean a postponement?

Mr. Roudebush: I mean a postponement.

The Court: You don't want any continuance to the latter part of the week.

Mr. Graydon: I would like to know upon what ground the postponement is requested.

The Court: What is the ground, Mr. Roudebush?

Mr. Roudebush: On the ground that I understood the agreement I had with Mr. Samuels was to the effect that they would admit the sales were made as alleged in the indictment, and now they have raised the point that the court has not jurisdiction, that the sales were not made here. The indictment alleges that the sales were made within the jurisdiction of this court.

Mr. Cramer: That only covers part of them.

Mr. Samuels: We admit that some of them were made here.

The Court: What?

Mr. Samuels: We admit that some of the sales were made here.

Mr. Cramer: And denying the fact that we did anything of that kind. If we had admitted it it could not bestow jurisdiction on this court, if the evidence showed that the transaction took place in Chicago.

40 The Court: No, but an admission would be evidence of the fact.

Mr. Samuels: No such admission was made, if Your Honor please.

Mr. Graydon: If Your Honor please, the indictments charge simply a purchase by The Matthew Addy Company of coal from the Bluefield Coal Company in West Virginia, without the jurisdiction of the court, and then that The Matthew Addy Company did feloniously ask, demand and receive a certain stated price for sales of parts of this coal to various named persons; and in each count it is set forth where those persons are located, and some of them are located within the vicinity of Cincinnati, and the fact is that those sales were made here, and the prices fixed, and the demand. And others for instance, one I have here, the Alexander Lumber Company, a corporation doing business in Chicago, Cook County, Illinois, and in respect to those the sales were made, as I understand it, at an office of the company in Chicago.

Now, Mr. Roudebush says he understood that counsel admitted certain facts. From what Mr. Samuels advises me, it is not a matter of understanding but a distinct statement that we would admit the names of the persons to whom the sales were made, including their

addresses, the price at which they were sold, and the amounts at which they were sold. Now, just before Your Honor vacated the bench we had undertaken to point out, with the assistance of Mr. Ford, who has the complete record here, the actual facts about these transactions. Suddenly Mr. Roudebush comes in and says, "I think I will demand a continuance." Now, for what purpose I don't know. It may be he doubts the accuracy of Mr. Ford's statements, but I submit to Your Honor the defendant is here now, ready to meet this indictment, and unless he is unwilling to take our statement in regard to that, that the Government has no ground for asking for a continuance or postponement of the case.

The Court: It will seriously disarrange the calendar of the court to postpone the trial. I assume that the stipulation is not fairly understood in the same way by counsel for both sides. If the admissions which are offered by the defendants are sufficient to justify the Government in proceeding, I would much rather proceed, but I don't think the Government should be pressed to a conclusion of the trial at this time if it has fallen into error through a
41 misunderstanding concerning a stipulation verbally made, perhaps not made as closely as it might have been.

Mr. Graydon: Well, if Your Honor please, I beg to suggest that in respect to those counts as to which the defendant admits the sales here, there certainly is no ground for not proceeding with the case. And, of course, the result of bringing in any evidence about these other counts will show that they were outside the jurisdiction of the court; there can't be any question of that.

The Court: How many counts.

Mr. Graydon: We have checked them over, Mr. Roudebush checked them, and we though he was finished and satisfied.

Mr. Roudebush: Mr. Graydon, I didn't say anything about being satisfied. And about the statement Mr. Samuels made you are absolutely wrong. We did not go into details and make the statements that you say we made here.

Mr. Graydon: Did you make any agreement with Mr. Samuels specifically in respect to any of these sales, that they were made at a certain place?

Mr. Roudebush: Mr. Graydon, the truth of the matter is that I was going to have my witnesses subpœnaed, and Mr. Samuels came in here after the trial of another case and said "You needn't subpœna your witnesses; we will admit the sales as you allege them there." We did not go into details about it.

The Court: Now, let us see what we can do.

Mr. Graydon: All right.

The Court: Now, without regard to the past——

Mr. Graydon: Very well. I suppose I might assist Your Honor by going over the matter. The very first sale is the 10th of September to The Alexander Lumber Company, a corporation doing business in Chicago, Cook County, Illinois. Mr. Ford advises me that sale was made by a representative of the company at its office in Chicago to the Alexander Lumber Company of Chicago.

Mr. Roudebush: And approved here, wasn't it, Mr. Graydon—

a contract signed here in Cincinnati, approved—subject to your confirmation?

Mr. Graydon: There was an acknowledgment of it.

Mr. Roudebush: Subject to the approval of Mr. Ford, here in Cincinnati?

Mr. Graydon: If there is any peculiar provision in the
42 particular contract I suppose they could prove that. If there was a reservation of right after the taking of the order and agreement on the price, and that is going to bring that transaction within the jurisdiction, that is a case the court can actually pass on. I am talking about the facts.

The Court: The fact for the court is——

Mr. Roudebush: Your Honor, there is also a question of the payment. They seem to not want to admit that the people paid for the coal as it was sold.

Mr. Samuels: That is not an admission, whether they received it. They merely asked——

The Court: The indictment alleges asked, demanded and received it.

Mr. Graydon: We concede that. Well, the first one was at Chicago.

The Court: How many of them are here? Are there enough counts here to satisfy the Government?

Mr. Graydon: I think so, yes. The second is at Chicago; the third is at Chicago; the fourth one is at Chicago; the fifth was a sale to Wagner Manufacturing Company, Shelbyville—Shelby, Ohio.

Mr. Cramer: Sidney, Shelby County.

Mr. Graydon: The sixth count in the Ford indictment?

Mr. Cramer: No, the company indictment—the same thing.

Mr. Graydon: The sixth count was Cincinnati; seventh count, South End Supply Company, Chicago, was made at Chicago; eighth count, South End Supply Company, Chicago, was at Chicago; ninth count, Batavia, Clermont County, Ohio, was made at Cincinnati; the tenth count, Batavia, Ohio, made at Cincinnati; eleventh count, Cincinnati, Ohio, made at Cincinnati; twelfth count, Connersville, Indiana, made at Cincinnati; thirteenth was at Cincinnati; fourteenth, Cincinnati; fifteenth, Cincinnati; sixteenth, Cincinnati; seventeenth, Cincinnati; eighteenth, Kraft & Company, Chicago, was made at Chicago; nineteenth, same, Chicago, Illinois; twentieth, Frey Brothers, Chicago, made at Chicago; twenty-first, Frey Brothers, Chicago; twenty-second, Frey Brothers, Chicago; twenty-third, Frey Brothers, Chicago. That is the company.

The Court: That is about half of them, isn't it?

Mr. Graydon: About half.

43 Mr. Samuels: More than half—twelve out of twenty-three.

Mr. Graydon: This is Ford's, the Ford indictment. The first count, Frey Brothers, Chicago—that was at Chicago; second count, Chicago; third count, Chicago; fourth count, Chicago; fifth count,

Cincinnati; sixth count, Cincinnati; seventh count, Cincinnati; eighth count, Cincinnati; ninth count, Cincinnati; thenth count, Cincinnati; eleventh count, Cincinnati; twelfth count, Cincinnati.

Mr. Samuels: Eight out of twelve.

Mr. Roudebush: Some of those were made out of Chicago.

Mr. Samuels: Eight out of twelve, out of Ford's.

The Court: I suppose defendant will be willing to stipulate with reference to those in which you say sales were made at Cincinnati, and that they were made at the place in the indictment alleged. Where you say the sales were made, I suppose that means did ask, demand and receive, as alleged in the indictment, the price therein alleged. And under those circumstances, is the Government ready to go ahead?

Mr. Roudebush: Do they admit the money was received here in Cincinnati?

Mr. Graydon: Yes, admit the venue of the offense as stated in the indictment.

The Court: What is there, then, in those indictments, that are matters of fact that are not admitted Mr. Graydon?

Mr. Graydon: Well, of course, it hasn't—the Government proposes to show the previous purchase. The matters of fact that are alleged in the stating part of the indictment is that there was a profit, or gross margin, realized upon it.

The Court: That is, you admit the purchase price and the sale price, but not——

Mr. Cramer: A profit.

The Court: That the difference constituted what is designated in the act as a gross margin?

Mr. Graydon: No, Your Honor.

Mr. Cramer: The indictment says profits.

Mr. Graydon: But we claim it did not constitute what is alleged in the indictment as having been a profit or gross margin.

44 The Court: Where the word "profit" in the indictment is mere surplusage, in order to convict it must be a gross margin.

Mr. Graydon: I would like Your Honor not to pass on the question whether that would be surplusage without hearing from us.

The Court: How could it be anything else?

Mr. Graydon: Briefly stated, an unnecessarily precise allegation of an essential fact must be proved as alleged——

The Court: No doubt of that.

Mr. Graydon: And especially in a case of this sort, Your Honor, where, if the Government is permitted to allege in an indictment, under an indictment aimed at profiteering, and that maatter is in the air, and a jury is impaneled to try a case, if they can be permitted to allege, without proving, that a gross profit charged, a gross margin charged was a profit, to that extent it is highly prejudicial. Unless they propose to prove that——

The Court: The terms of the indictment are a profit or gross margin.

Mr. Graydon: That means "to-wit." Under the established authorities that is an alternative of two things, that is to say, a profit or, to-wit, a gross margin.

The Court: What difference is it from alleging a gross margin?

Mr. Graydon: They must prove it was a profit and a gross margin, that is to say, we were under no expense whatever in doing business.

Mr. Cramer: We are accused of profiteering.

The Court: We will come to that question later. That is a question of construction, rather than of fact.

Mr. Graydon: Yes, I think it is a question that arises on the face of the indictment, because I suppose the court could take notice that a jobber, as defined in the act, doesn't do business without some expense.

The Court: At any rate, that question will arise when we come to it. Then are you ready to proceed, Mr. Roudebush?

Mr. Roudebush: Your Honor, if we get this stipulation so there can't be any question about these things they have stated now, so there won't be another argument in ten minutes——

Mr. Graydon: We propose to argue our clients' cases at any appropriate time the question arises.

45 Thereupon the following stipulation was entered into between counsel:

It is stipulated between counsel that the transactions in the 5th, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 17th counts of the indictment against The Matthew Addy Company were that the defendant, The Matthew Addy Company, acting in the capacity of a coal jobber, did ask, demand and receive from the parties in the said counts respectively set forth, for the quantities of bituminous coal in the said counts respectively set forth, a price of three dollars and fifty cents per ton f. o. b. at the mines producing said coal; that the said price of three dollars and fifty cents was twenty-five cents in excess of the price at which said The Matthew Addy Company had theretofore purchased said coal on July 31, 1917, per ton of 2,000 pounds, in the city of Cincinnati, Hamilton County, Ohio, at the times in the said counts respectively set forth.

The Court: Are the defendants willing to accept that?

Mr. Graydon: They are.

The Court: The Government can put on its proof as to the other counts.

Mr. Graydon: That is only in one indictment we have stipulated.

The Court: The other indictment, I suppose the stipulation would be the same.

Mr. Graydon; It will be the same, but we will have to specify the counts.

The Court: I suppose it would be that the defendant Mr. Ford, instead of the defendant The Matthew Addy Company——

Mr. Cramer: Substituting Mr. Ford's name and the number of the indictments.

The Court: The numbers of the counts. What are the numbers

of the counts in the other indictment. Have you got that, Mr. Roudebush, the numbers of the counts in the Ford indictment that they admitted?

Mr. Graydon: Before stipulating to that, if Your Honor please, we want to ask the Government to elect whether they will proceed against Mr. Ford or the company. It is not charged he did that individually.

Mr. Cramer: It is charged he did it as an officer of the company.

The Court: Why should there be any election?

46 Mr. Graydon: I don't want to stipulate that Mr. Ford did this transaction other than as alleged—that he did it as an officer of the company, that's all. You Honor suggested we stipulate that he——

The Court: I don't think there would be a right of election.

Mr. Graydon: I will make that motion and reserve an exception.

The Court: Overruled.

Mr. Cramer: Reserve an exception.

Mr. Graydon: Then in regard to the Ford indictment the counts at Cincinnati are the fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth.

Mr. Cramer: That is eight out of the twelve.

The Court: Very well. Are you ready to proceed now?

Mr. Roudebush: What will be the disposition of the other counts?

The Court: The Government will be put on its proof.

Mr. Roudebush: Can we have a postponement as to those other counts?

The Court: No, you can not have a postponement. The Government will be put on its proof on the other counts.

Mr. Roudebush: Will we have an opportunity to get our witnesses here for those?

The Court: If you can get them here tomorrow.

Mr. Roudebush: They are in Chicago.

The Court: You will have to get them here tomorrow morning. This was the time the case was set down to be tried.

Mr. Graydon: Let the stenographer note in respect to the Matthew Addy and Ford indictments that the defendants moved to elect as to which defendant it will proceed against, which motion was overruled, and the defendants excepted, and that that applies to each count in that indictment.

Thereupon the jury were returned into the jury box.

The Court: The jurors are all present. Do you want to offer that stipulation to start with?

Mr. Roudebush: We will call Mr. Easley.

The Court: Do you want to offer this stipulation?

Mr. Roudebush: Yes, sir.

Thereupon the stipulations in regard to both indictments were read to the jury.

47 Mr. Roudebush: It is also admitted the company is a corporation under the laws of——

Mr. Cramer: That was agreed in the other stipulation.

The Court: It is also agreed that the company is a corporation. Now, you have a witness to call?

Mr. Roudebush: Call Mr. Easley.

The witness FRANK S. EASLEY, sworn on behalf of the government testified he lived in Bluefield, W. Va., and did business there as president of the Bluefield Coal & Coke Company. That company had a contract with The Matthew Addy Company dated July 31, 1917, for the sale of forty car-loads of bituminous run-of-mine coal, signed on behalf of The Matthew Addy Company, by B. N. Ford, also another contract of same date. Said contracts offered in evidence as government exhibits No. 1, and No. 2.

The coal was shipped by the Bluefield Coal and Coke Company, on orders of The Matthew Addy Company as follows:

1 car, Oct, 10, 1917, to Consumers Coal and Supply Company, Elkhart, Ind.
1 car, Oct. 22, 1917, to Alexander Lumber Co.
1 car, Oct. 6, 1917, Fred Kluckhohn, Napersville, Ind.
1 car, Nov. 12, 1917, Fred Kluckhohn, same address.
" Oct. 16, 1917, Wagner Mfg. Co., Sydney, Ohio.
" Nov. 12, 1917, South End Supply Co., Chicago, Illinois.
" Nov. 16, 1917, South End Supply Co., Chicago, Illinois.
" Oct. 19, 1917, Rice & Laub, Batavia, Ohio.
" Sept. 25, 1917, Rice & Laub, Batavia, Ohio.
" Nov. 9, 1917, Boye & Emmes Machine Tool Co., Cincinnati, Ohio.
" Oct. 18, 1917, Connellsville Lumber Co., Connellsville, Ind.
" Oct. 10, 1917, Consumers Coal & Supply Co., Elkhart, Ind.
" Sept. 25, 1917, Consumers Coal & Supply Co., Elkhart, Ind.
" Oct. 13, 1917, Frank M. Dell. Indianapolis, Ind.
" Oct. 26, 1917, Frank M. Dell, Indianapolis, Ind.
" Oct. 20, 1917, D. G. McFadden, Ridgeville, Ind.
" Oct. 24, 1917, Kraft & Co., Chicago, Ill.
" Oct. 22, 1917, Kraft & Co., Chicago, Ill.
" Oct. 8, 1917, Frey Bros., Chicago, Ill.
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" Nov. 13, 1917, Frey Bros., Chicago, Ill.
" Nov. 8, 1917, Frey Bros., Chicago, Ill.
" Oct. 25, 1917, Frey Bros., Chicago, Ill.

These cars were all approximately fifty tons. Defendants objected to all the dates on the ground that they were immaterial and reserved exception to the overruling of the objection. All the shipments were requisitions upon the coal purchased by The Matthews-Addy Company from the Bluefield Company.

On cross-examination the witness testified that the contracts, Exhibits 1 and No. 2 were made on behalf of The Bluefield Coal & Coke Company, by S. S. Kofer, its general manager, duly authorized.

FRED C. REIF, a witness for the government, residence 267 McMillan street, Cincinnati, Ohio, office man in the Boye Emmes Machine Tool Company, Cincinnati, testified that that company bought one car-load of Pocahontas run-of-mine coal on an order of September 14, 1917 at $3.50 a ton of 2,000 lbs., which was shipped to the purchaser at Cincinnati, by the Bluefield Coal & Coke Company, shipment being made from Honaker, Virginia. The order was given to The Matthew-Addy Company by telephone in Cincinnati and payment was made here. The witness produced and offered in evidence government Exhibit No. 3, being the bill for said car-load of coal, government Exhibit No. 4, being the check in payment therefor, and government Exhibit No. 5, being the bill of lading.

HENRY H. GRUNKEMEYER, 3717 Eastern Avenue, Cincinnati, manager of the Whetstone Coal Company, 64 Congress Avenue, Cincinnati, testified that he purchased a car of Pocahontas run-of-min- coal from the Matthew-Addy Company, September 11, 1917, at $3.50 a ton, through defendant Ford. The order was given over the telephone in Cincinnati, and payment made here by check. The witness produced and the government offered in evidence Exhibits No. 6, No. 7 and No. 8, being the invoice, check and order on said shipment respectively. There was no contract for the purchase of this coal prior to September 7, 1917.

H. M. RICE, of Batavia, Clermont County, Ohio, doing business there as Rice & Laub Coal Company, testified that he made the purchases already stipulated, being two carloads as charged in the indictment; that the contract was made in the office of The Matthew-Addy Company in Cincinnati with Mr. B. N. Ford, sometime after
49 government had set the price on coal, and payment made here, also that there was no previous costract. The government offered in evidence government exhibits Nos. 9, 10, and 11, being freight bills, invoices and checks covering these two shipments.

IVAN M. MCCLATCHIE, of Chicago, Illinois, buyer for Alexander Lumber Company, testified that he purchased coal for that company from The Matthew-Addy Company on or about September 10, 1917. The coal was Pocahontas run-of-mine and the contract was made with Mr. Zimmerman, Chicago representative of The Matthew-Addy Company in Chicago. The price was $3.50 a ton, and there was no previous contract between The Matthew-Addy Company and the Alexander Lumber Company. Government Exhibits Nos. 12 and 13, being the original purchase order and invoice on this purchase order and invoice on this purchase were offered in evidence.

On cross-examination the witness testified to his signature to a letter of October 18th, to A. J. Devlin, Special Agent of the Department of Justice which was offered in evidence as defendant's Exhibit A.

F. W. CORNELIUS, of Indianapolis, Indiana, General Manager of Frank M. Dell, as a witness for the government testified to a purchase from the Matthew-Addy Company of a car of red ash run-of-mine coal at $3.50 per ton; purchase having been made at Cincinnati, Ohio, without any previous contract. Government Exhibits 14, 15 and 16, being the invoice, the check and contract covering the foregoing transaction were offered in evidence.

D. G. MCFADDEN, doing business as D. G. McFadden Grain Compayn, of Ridgeville, Indiana, testified to a purchase of a carload of coal from The Matthew-Addy Company on or about September 24, 1917, at $3.50 per ton at the mines, being Pocahontas run of-mine. The check in payment thereof was mailed to The Matthew-Addy Company at Cincinnati. The contract signed by B. N. Ford, Vice President of The Matthew-Addy Company, was offered in evidence as government Exhibit No. 17.

WILLIAM KRAFT, 4350 North Leavitt street, Chicago, sworn as a witness for the government, testified to a purchase of coal from The Matthew-Addy Company, September 13, 1917, for $3.50 per ton. He had no previous contract for the coal. Payment was made by check sent to Cincinnati. Witness produced, and government put in evidence the invoices being Exhibits Nos. 18 and 19.

50 On cross-examination the witness testified that the order was given and accepted, the price fixed at Chicago, Illinois.

GEORGE J. FREY, a witness for the government, residence 1914 Summerdale avenue, Chicago, doing business under the name of Frey Brothers, testified to a purchase of coal from The Matthew-Addy Company on or about September 10, 1917, consisting of four carloads at $3.50 per ton, and produced the checks in payment therefor, the invoices and expense bills which were offered in evidence as government Exhibits Nos. 20 to 34 inclusive. The coal was Pocahontas run-of-mine, the price $3.50 per ton at the mines, and there was no contract for the purchase previous to September 11, 1917. On cross-examination the witness testified that he obtained the price and accepted the offer on all four cars as a single transaction in the office of The Matthew-Addy Company in Chicago, Illinois, through Mr. Zimmerman.

FRED R. KLUCKHOHN, a retail coal dealer of Naperville, Illinois, testified to a purchase on September 7, 1917, from The Matthew-Addy Company, and produced an invoice covering two cars. He had no contract prior to September 7th insofar as he could recollect. He stated that he did his business through the Chicago office of The Matthew-Addy Company, but the invoice was stamped at Cincinnati. The two invoices and confirmation of the order were offered in evidence as government Exhibits Nos. 35, 36 and 37. On cross-examination the witness testified that the transaction occurred in Chicago, and that he had no dealings with the Cincinnati office. The two cars were a single transaction.

FRANK G. KOZLOWSKI, of West Pullman, Chicago, Illinois, called as a witness by the government testified that he was a coal dealer in West Pullman, carrying on business under the name of West Pullman Fuel Company; that he purchased coal from the Matthew-Addy Company on or about September 8, 1917, having no contract previous to that day; trat he paid for the same by sending in check to the Chicago office of The Matthew-Addy Company, which check and the invoice were offered in evidence as government Exhibits Nos. 38 and 39.

ELMER FRED ERICKSON, Manager South End Supply Co., Kensington, Illinois, testified to a purchase of coal from The Matthew-Addy Company, September 13, 1917, without previous order at $3.50 per ton. Payment was made by checks sent to Cin-
51 cinnati, which checks are offered in evidence as government Exhibits Nos. 40 and 41. The sale was made and confirmed through the Chicago office of The Matthew-Addy Company.

J. M. HUMPHREY, 3560 Vista Avenue, Cincinnati, called as a witness for the government testified that in the fall of 1917 he was working for The Matthew-Addy Company in Cincinnati, of which B. N. Ford was general manager of the coal department, passing upon the purchases and sales. The witness was engaged in buying and selling and assisting in the office.

Witness stated that The Matthew-Addy Company was a jobber, that is to say, a person who purchases and resells coal to coal dealers or consumers without physically handling it on, over or through his own vehicle, trestle, dock or yard. The company had a branch office in Chicago, the main office being at Cincinnati. The witness testified that he offered for sale the coal covered by the indictment at $3.50 per ton f. o. b. mines under instructions of B. N. Ford. The witness could not recall the persons to whom he offered the coal for sale, but being shown a list by the United States attorney said "I think possible I sold this F. M. Dell of Indianapolis, Indiana, a car, and probably offered for sale to The Consumers Coal & Supply Company, Elkhart, Indiana; those two I think possibly I sold." On cross-examination the witness testified he recalled that he had sold Frank M. Dell and The Consumers Coal & Supply Company.

On cross-examination witness testified that he left the employment of The Matthew-Addy Company sometime in July, 1918, that "possibly" he was discharged. He had a conference with the United States attorney or a representative of the Department of Justice in regard to testifying in the case. This conference was in the Federal Building at Cincinnati. He did not advise the United States attorney or any representative of the Department of Justice that Mr. Ford had authorized or fixed the price of the coal at $3.50. The substance of his conversation with them was that the witness was asked as to who was in charge of the coal department of The Matthew-Addy Company.

It was thereupon stipulated between counsel for the government and for the defendants in respect to counts five and six of The Matthew-Addy indictment that the purchaser of the coal covered
52 by said counts, The Wagner Manufacturing Company of Sydney, Ohio, purchased the two cars as one transaction on September 7, 1917, without previous contract.

In respect to the twelfth and thirteenth counts in the indictment against The Matthew-Addy Company covering two cars, being one transaction, that the purchaser, Connellsville Lumber Company, had no contract for the purchase prior to September 12, 1917.

The Court: Does the Government rest with that?

Mr. Roudebush: Yes, Your Honor.

Mr. Graydon: If Your Honor please, I move to dismiss the indictments, each of them, and each count separately.

The Court: Gentlemen of the jury, you may have a recess until you are called.

Thereupon the Jury retired from the court room.

Mr. Graydon: At the close of the evidence for the Government the defendants, and each of them, move the court to dismiss the cases and each count of each indictment, separately, on the ground that the indictments state no offense, and that the evidence fails to substantiate the allegations of the indictment and each count therein, respectively, and on the grounds, and especially relying upon all the grounds heretofore stated in support of the motions to quash and the demurrers.

And the defendants, and each of them, move the court separately to dismiss the first count of the indictment against The Matthew-Addy Company, on the ground that it appears that the transaction did not occur within the jurisdiction of the court; and the same in respect to the second count of the indictment against The Matthew-Addy Company; and the same in respect to the third count.

And if said motion in respect to the second and third counts be not granted, defendant, The Matthew-Addy Company, moves the court to require the Government to elect whether it will proceed upon said second count or said third count, on the ground that the evidence shows that they constituted a single transaction within the meaning of the statute.

And defendant, The Matthew-Addy Company, moves the court to dismiss the fourth count on the ground that the evidence showed that the transaction occurred outside the jurisdiction of the court.

And in regard to the fifth and sixth counts, being sales
53 to the Wagner Manufacturing Company of Shelby County, Ohio, defendant moves to require the Government to elect upon which count it will proceed, on the ground that the two constitute a single transaction.

In regard to the seventh and eighth counts defendant moves the court to dismiss the same on the ground that the transactions occurred outside the jurisdiction of the court; and, if said motion be not granted, to require the Government to elect upon which it will proceed, on the grounds heretofore stated.

In respect to the thirteenth count and the fourteenth count, de-

fendant moves the court to require the Government to elect, on the ground that the two constitute a single transaction under the statute.

In regard to the eighteenth count defendant moves the court to dismiss, on the ground that the transaction occurred outside the jurisdiction of the court. The same motion in regard to the nineteenth count. And if said motions in respect to either of said eighteenth or nineteenth counts be not granted, to require the Government to elect upon which it will proceed, the two constituting a single transaction under the statute.

And the defendant moves the court, in respect to the nineteenth, twentieth, twenty-first, twenty-second and twenty-third counts, to dismiss the same, and each of them, on the ground that the evidence shows that they occurred outside the jurisdiction of the court; and in regard to, and if said motion be not granted in respect to said twentieth, twenty-first, twenty-second and twentythird counts, defendant moves the court to require the Government to elect upon which of said four counts it will proceed, upon the ground that said four carloads covered in each of said counts constitute one transaction within the meaning of the statute.

In the indictment against B. N. Ford defendant moves the court to dismiss the first count, on the ground that the transaction occurred without the jurisdiction of the court; and the same motion in respect to the second, third, and fourth counts; and if such motion be not granted in respect to any or all of said counts, said defendant moves the court to require the Government to elect upon which of said counts it will proceed, on the ground that they all constitute a single transaction within the meaning of the statute.

In respect to the fifth and sixth counts, defendant moves
54 the court to require the Government to elect upon which it will proceed, upon the ground that said two counts constitute a single transaction under the statute. And the same motion in respect to the seventh and eighth counts. And the same motion in respect to the tenth and eleventh counts.

The Court: Anything else?

Mr. Graydon: I would like to present to Your Honor another ground that hasn't been suggested specifically for holding these indictments bad, if it isn't too late to suggest it.

The Court: Proceed.

Thereupon counsel proceeded to present the point suggested to the court, after which the following proceedings were had:

The Court: This morning I sustained objection of the defendant to evidence proposed by the Government to show that defendants had knowledge of the rules promulgated. At that time I had not in mind the exact language of the penal clause of Section 25 of the Lever Act, providing "that whoever shall, with knowledge of the regulations prescribed under the act, violate," etc. The Government may therefore have leave to recall its witness upon the subject of such knowledge.

With reference to the term in the indictment "profit or gross margin," if we assume—and it would be fair to assume—that some expense attaches to the business of jobbing coal, the terms "profit"

and "gross margin" would not be synonymous with the profit to be taken to mean net profit, but if the profit be understood to mean in the indictment "gross profit" then the two terms would be synonymous. And whether we read the word "or" in its ordinary significance as "or," or whether we read it as contended by the defendants it is to be read, that is to say, "to-wit," the allegation would be unintelligible unless we understand the word "profit" to mean "gross profit." But, so reading it, it is entirely intelligible—in fact, the words "gross margin" then became a definition of the word "profit." It is as though it were said "profit, that is to say, the gross profit, the difference between the cost price and the selling price." Therefore, it seems that the Government is not restricted to the showing of a net profit exclusive of expenses to sustain the indictment, but to showing that a margin, gross margin, which has been done, is sufficient.

55 The sufficiency of the indictment, generally speaking, has been heretofore passed upon in the ruling on the motion to quash and the ruling upon the demurrer to the indictment. It is now urged that the phrase in the second section of the Presidential Order of August 23, 1917, which reads "For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of fifteen cents per ton of two thousand pounds"—it is contended that the phrase means for a future transaction embracing both buying and selling of coal a jobber shall not add. Whether it be called a regulation of the coal business or a fixing of price, I am of the opinion that it was within the power of the President to prescribe the gross margin that a jobber might earn under the terms of the act. Having in mind the well-known practice of West Virginia bituminous fields to contract in advance for the mine output, the total mine output, or substantially so, from season to season, a regulation prescribing prices of coal that left existing contracts in force and prescribed no margin of profit to the jobber, but permitted him to ask, demand and receive so much in excess of his contract price as he might be able, under the exigencies of the war then existing, to get, would have fallen far short of the regulation of the prices of coal that Congress undoubtedly intended to secure by this law. In my opinion, the phrase "For the buying and selling of bituminous coal a jobber shall not add" means that he shall not hereafter add, whether the contract for the coal took place before or after the promulgation of the Presidential Order.

And, therefore, the motion to dismiss the several counts upon the grounds mentioned is overruled as to each respective count.

Mr. Graydon: Note our exception.

The Court: It is further moved to require the Government to elect between counts in those instances in which the transaction involved a shipment of more than one carload lot. The Government, in the indictments, seems to have regarded each carload necessarily as a separate transaction; but it is not so. The purchase and sale of a certain quantity or tonnage of coal was the transaction, regardless of the number of cars that might be required to contain or trans-

port the same; and inasmuch as one transaction can only be made the subject of a single count, in each of those instances the
56 Government will be required to elect between or among the counts covering the single transaction.

Have I covered everything that has been proposed?

Mr. Roudebush: Your Honor, could we adjourn at this point for the noon recess, until we have an opportunity to check up these different counts, and also to get our witnesses here?

The Court: Very well. We will at this time recess until two o'clock. Bring in the jury.

Thereupon the jury were returned into the jury box, and after they had been duly cautioned by the court a recess was taken until two o'clock in the afternoon of the same day, at which time the trial proceeded as follows:

Afternoon Session, Wednesday, June 2, 1920.

Court met pursuant to recess, all counsel being present.

Mr. Graydon: The court did not say anything specifically about the venue of some of these contracts. I did not know whether that matter was one that had been overlooked.

The Court: It was overlooked. There were certain of these counts with regard to the venue. I confess I haven't the evidence as to each count specifically in mind. I will have to reply upon the assistance of counsel in that regard, I expect.

Mr. Roudebush: Your Honor, I have Mr. Humphrey here, if you care to go on with the testimony.

The Court: No, let us pass upon the matter of venue before we proceed any further with these other counts. The first four counts of the company indictment were not covered by the stipulation. What was the evidence with regard to the venue on the first four counts? The first count was the Alexander Lumber Company. Someone was here from the Alexander Lumber Company, was he not? Who was that?

Mr. Roudebush: Mr. McClatchie.

The Court: Well, he said he made the contract with Mr. Zimmerman, that he doesn't know whom he paid. As to that count the motion will be granted, I think, Mr. Roudebush.

Mr. Roudebush: If Your Honor please, there is in evidence Government Exhibit No. 12, which shows that the payment was made here at Cincinnati.

The Court: What does it show?

57 Mr. Graydon: It shows it billed or made out at Cincinnati, that is all.

Mr. Roudebush: It is marked Cincinnati.

The Court: Let the motion on that count be granted, Count Number One of The Matthew Addy Company indictment.

Now, the second count charges with reference to Fred Kluckhohn. Did we have anybody with regard to Fred Kluckhohn? He was the man from Haperville, Illinois?

Mr. Graydon: Naperville, Illinois.

The Court: I got it Naperville. He said he couldn't recollect where the payment was made, except there was an invoice stamped "Paid" at Cincinnati.

Mr. Roudebush: It is in evidence here, marked "The Matthew Addy Company, Cincinnati, Ohio, Paid December 6." Also says, "When due please remit to Treasurer of The Matthew Addy Company, Box 665, Cincinnati, Ohio"; also one marked "Paid" at Cincinnati, Ohio, November 6th.

Mr. Cramer: He testified he purchased that coal from Mr. Zimmerman. Zimmerman gave him the car numbers and he told him he would take them.

Mr. Roudebush: There is also in evidence Exhibit No. 37, showing that The Matthew Addy Company accepted this, by B. N. Ford, Cincinnati, Ohio.

Mr. Cramer: Accepted what? Acknowledged receipt of the order, is all.

Mr. Graydon: Acknowledged receipt of the order.

Mr. Roudebush: On the back of it it says no sale is valid unless accepted by an officer of the company here at Cincinnati.

The Court: I expect the motion will have to be overruled as to this second count.

Mr. Graydon: Note an exception.

The Court: Now, the third one——

Mr. Roudebush: We will elect the second count, Your Honor.

The Court: You elect the second count, do you?

Mr. Roudebush: Yes, Your Honor.

The Court: Let the election be noted. The fourth count is West Pullman Company.

Mr. Graydon: He said he sent the check to the Chicago office.

The Court: In the absence of any record evidence, that
58 motion will have to be granted. There was nothing but an invoice.

Mr. Roudebush: There was an invoice and check showing it was paid at the Cincinnati office.

The Court: Is the check there?

Mr. Roudebush: Yes, Your Honor.

The Court: What does the check show?

Mr. Roudebush: Pay to the order of the Citizens National Bank, Cincinnati, Ohio, The Matthew Addy Company by R. M. Lambert, Treasurer. It also has on the bill "Paid The Matthew Addy Company, Cincinnati, Ohio." Also, "When due, please remit to Treasurer, The Matthew Addy Company, Cincinnati, Ohio."

Mr. Graydon: I don't think that request is of any significance, if Your Honor please.

Mr. Roudebush: It is stamped on the bill.

Mr. Graydon: The entire accounting department is here, and having sent the check in payment to the Chicago office, they could transmit it to any place without changing the venue of the offense.

The Court: He said he paid the check to the Chicago office. Let that motion be granted. Now, the next one is what?

Mr. Graydon: The fifth and sixth were Cincinnati transactions.

The Court: That was to elect between the fifth and sixth?

Mr. Roudebush: We elect, Your Honor, to take the fifth, as between the fifth and sixth counts.

The Court: You elected the second as between the second and third, did you?

Mr. Roudebush: The second as between the second and third.

The Court: And you now elect the fifth as between the fifth and sixth?

Mr. Roudebush: As between the fifth and sixth.

The Court: Now, with reference to the seventh and eighth counts?

Mr. Roudebush: We elect the seventh as between the seventh and eighth.

The Court: You elect to stand on the seventh?

Mr. Roudebush: Yes, Your Honor.

The Court: Now the motion is directed against the seventh and eighth also, I believe?

Mr. Graydon: Yes, sir.

59 The Court: South End Supply Company. Was anyone here from the South End Supply Company?

Mr. Roudebush: Yes, Your Honor—Mr. Erickson.

The Court: He said he made payment to Cincinnati, Ohio. Let the motion be overruled.

Mr. Graydon: Note an exception.

The Court: The eighth?

Mr. Roudebush: We elect the seventh as between the seventh and eighth.

The Court: Yes.

Mr. Roudebush: The ninth and tenth, Your Honor, are different transactions, on different dates. The ninth count was ordered on the 26th of August.

The Court: I haven't any motion here to elect between the ninth and tenth. The next motion I have is to elect between the thirteenth and fourteenth.

Mr. Roudebush: We elect the thirteenth as between the thirteenth and fourteenth. This was at Cincinnati. It is covered by the stipulation.

The Court: Now, was there a motion to dismiss as to the thirteenth and fourteenth?

Mr. Graydon: No.

The Court: No. They were covered by the stipulation. What was the next motion to dismiss?

Mr. Roudebush: The eighteenth, I think—eighteenth and nineteenth, to elect.

The Court: The eighteenth count was with Kraft & Company. Kraft was here. He said he paid to Cincinnati, Ohio. Motion overruled.

Mr. Graydon: Note an exception. There was a motion to elect in regard to that.

Mr. Roudebush: We elect the eighteenth as between the eighteenth and nineteenth.

The Court: You elect the eighteenth as between the eighteenth and nineteenth. Twentieth count?

Mr. Graydon: Twentieth, twenty-first, twenty-second and twenty-third are all Frey Brothers, of Chicago, on the 10th of September. Motion to elect as between those four.

Mr. Roudebush: Your Honor, we elect to——

The Court: Wait until I pass on the motion to dismiss, first. Who was here from Frey Brothers?

Mr. Roudebush: George J. Frey.

The Court: He said he paid The Matthew Addy Company
60 by mailing a check to Cincinnati, so the motion to dismiss will be overruled.

Mr. Graydon: Note an exception.

Mr. Roudebush: We elect the twentieth as between the twentieth, twenty-first, twenty-second and twenty-third.

The Court: Very well; we will go back and see which ones of these counts are out.

Mr. Graydon: The first is out.

The Court: Was that dismissed or an election?—Dismissed.

Mr. Graydon: The third is out on an election; fourth was dismissed; the sixth is out on an election; the eighth is out on the Government's election; the fourteenth is out on the Government's election; the nineteenth is out on the Government's election; the twenty-first, twenty-second, twenty-third are out on the Government's election.

The Court: Now we will pass to the Ford indictment. Do you elect the fifth or the sixth count, Mr. Roudebush?

Mr. Graydon: There is an election between the first four.

Mr. Roudebush: The first, second, third and fourth, Your Honor. We elect the first in regard to the first, second, third and fourth.

The Court: Between the fifth and sixth?

Mr. Roudebush: The fifth as between the fifth and sixth.

The Court: Between the seventh and eighth?

Mr. Roudebush: Your Honor, the seventh and eighth were different transactions. That is the one at Batavia, Ohio, one sold on the 26th of August and one on September 8th. That is one I spoke of a minute ago.

Mr. Graydon: I think that is correct.

The Court: Very well; there is no election to be required between those. Between ten and eleven?

Mr. Roudebush: Ten as between ten and eleven.

The Court: Now, which ones—in which ones was the jurisdiction in question? The jurisdiction was questioned, I believe, on the first four counts only. The others were covered by the stipulation.

Mr. Roudebush: Your Honor overruled that. That was Frey Brothers. He was here.

The Court: The fourth count?

Mr. Roudebush: The first three.

The Court: You elect the first count. That is Frey Brothers.

Mr. Roudebush: That is Frey Brothers. He was here.

61 The Court: The motion as to Frey Brothers will be overruled, the first count.

Mr. Graydon: Note an exception.

The Court: That therefore takes out the second, third, fourth, sixth and eleventh counts, does it not?

Mr. Roudebush: Yes.

Thereupon, J. M. HUMPRREY, being recalled as a witness for the government, was asked whether he knew whether Mr. B. N. Ford was aware of the regulation promulgated by the President of August 23, 1917, "whereby the jobbers' gross margin was fixed at 15 cents per ton of 2,000 lbs." On objection being sustained, he was asked whether he had any conversation with B. N. Ford on or about August 23, 1917, relative to said regulation, and answered that he had a conversation with Ford two or three days after the ruling came out. The substance of the conversation was that the witness asked Ford what should be added as a commission of the Matthew Addy Company to coal which the company had on contract and "he advised me that we were to add 15 cents on our regular stuff on which we did have contract, but on the stuff such as that Pocahontas coal we were to add 25 cents per ton as we had been doing." The witness also had other conversations with Ford in respect to rulings that were being promulgated in Washington from time to time and also a discussion with Ford on or about August 23d in regard to the gross margin of 15 cents. Particularly in respect to the coal purchased from the Bluefield Coal & Coke Company, Ford instructed the witness to quote that coal at $3.50 which he did. Witness stated that he and Ford discussed the government's regulations, which was 15 cents a ton, but said, "I was to add the 25 cents a ton which we had been adding." The witness stated that he (Ford) knew it was in effect; he knew there was a 15 cent gross margin in effect. On motion of defendants this answer was stricken out.

Witness testified to a conversation with Ford on or about August 23, 1917, concerning the regulation of that day and said that Ford told the witness that "the regulation was a gross margin of 15 cents a ton."

The witness stated that on or about August 23, 1917, The Matthew Addy Company was receiving bulletins issued by the Fuel Administration in Washington, containing orders and regulations, and received such a bulletin promulgated August 23, 1917, with
62 reference to jobbers' margins in bituminous coal. The witness further stated that coal journals of the National Coal Jobbers were also received in the office. One publication of this journal the witness stated to the best of his knowledge contained the same issue that was published by the government.

Mr. Ford had the regulation of August 23, 1917, on his desk.

On cross examination the witness stated that in the months of August and September, 1917, he was traveling buying and selling coal possibly in Harlem, Letcher and Perry Counties, Kentucky. Sometime during 1917 he was in East Bernstadt in Laurel County, Kentucky, and also made a trip to West Virginia. Witness could

not state whether he was in Cincinnati any time in August, 1917, or that he was there during the first week in September; nor the second week in September. He ceased to be employed by The Matthew Addy Company in July, 1918, having been with them three years or more.

The witness stated that the first time he ever saw the regulation of August 23, 1917, was in Mr. Ford's office, and that he read it, but could not give the date. Sometime in the fall of 1917 he was at Whitesburg, Kentucky, and later may have been in Lexington. When Mr. Ford discharged the witness from the employment of The Matthew Addy Company he spoke to him about "your habit of drinking."

Thereupon the witness J. M. Humphrey retired from the witness stand.

The Court: Anything further from the Government?

Mr. Roudebush: No.

Mr. Graydon: We renew the motions made, if Your Honor please, on the same grounds and on the additional ground of a failure of proof to show knowledge in respect to any particular time named in the different counts in the indictments.

The Court: Same ruling on it, respectively, the same ruling on each one of the motions that was made before.

Mr. Graydon: Note an exception. We will offer in evidence, if Your Honor please, a copy of what is known as the Lane-Peabody agreement——

Mr. Roudebush: I object to that, and object to any statements before the jury relative to that.

Mr. Graydon: I haven't made any statements, except an offer of it.

63 Mr. Samuels: If Your Honor please, Mr. Roudebush has admitted that this is the paper so designated, without any additional proof.

The Court: Any question about the designation of the paper?

Mr. Roudebush: No, Your Honor. I said they wouldn't have to bring any witnesses to prove the paper.

The Court: Your objection goes to substance, not as to execution of the document?

Mr. Roudebush: Absolutely.

The Court: Perhaps the jurors had best step aside a few minutes.

Thereupon the jury retired from the court room.

The Court: What is the purpose of the offer, please?

Mr. Graydon: If Your Honor please, this agreement was one that was made by a quasi-official body, Secretary Lane and Mr. Peabody representing miners and the Government, and thereunder it fixed certain prices and a commission of twenty-five cents. Now, it has already been testified by this last witness that that commission of twenty-five cents was followed in respect to certain of the coal sold, and he is undertaking to testify further that Mr. Ford had knowledge of the regulation of August 23rd. I think that this

document is competent possibly to rebut any inference of knowledge in regard to that, and indicate from where the twenty-five-cent price which was in force at the same time as this fifteen-cent price, came.

The Court: What is the date of the agreement?

Mr. Graydon: July 28, 1917, never expressly advocated by the parties that made it nor expressly repealed by any proclamation of the President, as far as I know. It was put forth under a conference, under an act of Congress, and the action taken at the conference, as announced in the official proclamation of the Department of the Interior, fixed the prices on bituminous coals at various amounts, and twenty-five cents for a net ton was fixed as the maximum price per ton for coal jobbers' commissions, with only one commission, no matter how many jobbers' hands the coal may pass through.

The Court: Did it fix any fifteen-cent price?

Mr. Graydon: No, Your Honor. It seems to me that is competent especially in relation to this question of the violation of the fifteen-cent regulation with knowledge. The only testimony on that point is rather indefinite as to time, the statement of this witness that Mr. Ford was advised about that fifteen-cent regulation. Now, of course, the jury doesn't have to credit the statement of that witness, and I think they have got a right to know that Mr. Ford before that time knew about the twenty-five-cent commission.

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The Court: Well, if the agreement fixed a fifteen-cent rate in certain instances, which would tend to explain the giving of the fifteen-cent rate, the last witness' testimony as to the fifteen-cent rate on non-contract coal, it might possibly reflect upon the situation; but it shows nothing but a twenty-five-cent rate, and that doesn't seem to me to reflect upon his knowledge at all as to this order. I am inclined to think that will have to be excluded.

Mr. Samuels: It might also, if Your Honor please, go to the proposition that will no doubt be renewed at the end of all the testimony, as to the interpretation and the intention of Congress of the Lever Act, what effect this had upon the passing of the Lever Act and the consideration to be given to it by the court, what Congress had in mind when it used the word "contract"—whether it should have a retrospective or prospective aspect. While Your Honor has passed upon it, we wish to renew our motion at the end of the evidence. It may have an important bearing. We could not ask that question before because it was not before the court, but if it is in evidence it would be before the court to pass upon the evidence as it will be renewed in its supplementary form.

Mr. Cramer: This is being introduced to show why the twenty-five cents was fixed, in mitigation of any guilt that might be later determined in this case, and we have a man here to identify——

The Court: That would hardly be a matter for the jury, Mr. Cramer. The present thing before the court is to submit the question of the proof of the indictment before the jury, the competent evidence. The question of mitigation would hardly be for consideration at this time, would it? It is not like a civil——

Mr. Cramer: The court, in its announcement of its decision this

noon, stated he took official knowledge of a certain custom of a certain coal field, and the witness we have to testify as to the Lane-Peabody agreement. We expect to prove it was the custom of the entire coal trade that on contracts entered into under the Lane-Peabody agreement and not sold prior to August 23rd, that the twenty-five cents was charged by the entire trade.

65 The Court: It doesn't seem to me that the document is competent, and the objection will be sustained.

Mr. Graydon: We will offer what is conceded to be a correct copy of the Lane-Peabody agreement, and mark it "Defendant's Exhibit B."

The said document is thereupon marked for purposes of identification as "Defendant's Exhibit B" and is submitted herewith.

Thereupon the jury were returned into the jury box, and the trial proceeded as follows:

FRANK C. DECKEBACH, called as a witness on behalf of defendants, having been first duly sworn, testified as follows:

Examined by Mr. Graydon:

Q. What is your business, Mr. Deckebach?

A. Certified public accountant.

Q. How long have you been engaged in the business of public accounting?

A. Twelve years.

Q. You have an office in Cincinnati?

A. Yes, sir.

Q. I will ask you whether you went over the books and papers and other information, or had the investigation made under your direction, of the selling department, of the department of The Matthew Addy Company which is in the business of selling coal and coke, whether you got those figures for the year 1917?

A. Yes, sir.

Mr. Roudebush: I object.

The Court: Well, he might answer whether he did or not.

A. Yes, sir.

Q. Did you make a statement showing the cost to that company of selling coal and coke by months during that year?

Mr. Roudebush: I object, Your Honor.

A. Yes, sir.

The Court: He may answer whether he did or not. It isn't an important question yet.

Q. Have you the statement with you?

A. No, sir, but I think my—I think——

Q. (Handing document to witness.) I will ask you whether this is the statement that you made, that was made up under your supervision?

A. Yes, sir.

Q. Is that it?

66 A. Yes, sir.

Q. I want to direct your attention to the figures for September, 1917——

Mr. Roudebush: I object, Your Honor.

Q. —and I will ask you what the first item in that month, of coal, 25,315, means?

The Court: I suppose now you are attempting to prove what was stated in the opening concerning the cost of making sales——

Mr. Graydon: Yes, sir.

The Court: —in this month. I will hear from counsel for defendant on the subject. I understand, I think, what you expect to prove.

Mr. Graydon: Yes. Well, we expect to prove, if Your Honor please, that this gross margin——

The Court: I understand what you expect to prove; I believe I have that in mind from the opening statement.

Mr. Graydon: I thought Your Honor asked me.

The Court: No, I am asking the legal phase of the question, what are the claims of the contention?

Mr. Graydon: Our contention is that if the order of the President by itself or under authority of the act of Congress, provided or was intended to provide that The Matthew Addy Company must sell its coal through that department at a loss, that the order and the act of Congress are both unconstitutional and a violation of the Fifth Amendment of the Constitution of the United States, and we propose to produce the evidence to show the fact which would be the basis of the argument of unconstitutionality. And whether it is as interpreted by the court already—as I understand, the ruling on the demurrer is to the effect that the Government doesn't have to show that this twenty-five cents added to the purchase price included any profit; as I understand the construction of the court, the court, in my humble view, has entirely misconstrued the plain, ordinary meaning of the word "profit." "Profit" means profit, as I understand it; it means what is left after you pay the expenses. But I understand that the court has said that the Government is at liberty to insert that word "profit" in an indictment and to allege in the indictment that the company made a profit in excess of fifteen cents, and to relieve the Government of any requirement of offering any proof in support of that allegation. Now, we propose to show

67 the negative. If that allegation is to be left in the indictment, and the Government is relieved of proof, we propose to show, as a matter of fact, that the fifteen cents did not cover the cost. I submit to Your Honor that it is competent unless the act of Congress and the order of the President proposes to confiscate the services and the property of this defendant under an act which is supposed to deal with profiteering and causes a fine of five thousand on twenty-three counts, and possibly send somebody to jail, when they didn't make a cent of profit.

Mr. Roudebush: Your Honor, I object to these statements before the jury, under the court's ruling.

Mr. Graydon: I am stating what the evidence will propose to show, Mr. Roudebush.

Mr. Roudebush: The court has already ruled on the point.

Mr. Graydon: I don't know that the court has already ruled on it. I suppose if the court has, the court will advise us.

The Court: Just let us proceed. The question of the constitutionality of the act has been before the court, and the opinion of the court upon that subject has been expressed. Congress had the right, under the circumstances and in the exigencies of the war, to delegate to the President of the United States the power to fix prices and prescribe regulations for the production and distribution of coal. Public danger justifies the substitution of executive process for judicial process. Under such circumstances executive process is the equivalent of judicial process. When the President promulgated the regulation in question it was, therefore, promulgated in due process of law. The priority of the regulation promulgated by the President is not open to question. The regulation promulgated by the President in accordance with the act had the force and effect of law. Now, it is like a railroad rate, duly promulgated—it is not open to anyone to say that in any particular transaction, or in any month of transactions, the rate prescribed did not prove profitable to him. It is the rate that was prescribed by the Government of the United States in accordance, as has heretofore been held by the court, with due process of law; therefore, it is not for us to inquire whether, in this particular instance or in this particular month, and to this particular coal jobber, the rate prescribed was a profitable rate or not. The rate was binding upon all upon its promul-
68 gation. Accordingly, the evidence now proposed to be given as to the cost to this particular company, selling coal at this particular time, is not competent, and the objection to this will be sustained.

Mr. Graydon: Note an exception. And now, if Mr. Roudebush doesn't want the jury to hear this, I suggest they might go out. It will be quite long and I don't know that I can whisper it so they won't hear it. I will try to, though.

The Court: Very well; you may state it to the stenographer. I don't know that the jurors will hear it. If they do, I don't think they will pay any attention except to what I admit to them.

Mr. Graydon: Exception noted on behalf of both defendants in respect to each count, and the defendants state that if permitted to answer, the witness would testify that in the month of September, in respect to gross sales of coal in the month of September, 1917, they amounted to 25,315 tons.

(At this point one of the jurors left his seat in the jury box, and thereupon the court excused the jury temporarily and they retired from the court room.)

That he had set off against the total sum of money received therefor all items of expense, to-wit, the net-direct expenses for coal sales,

the net overhead expenses properly chargeable against coal sales, the coal sales expenses of the Chicago branch, and the total expenses of net and overhead of the Chicago branch, and dividing the remainder by the number of tons found that the cost of coal sales in cents per ton for said month was seventeen cents nine mills. Upon the same computation for the month of October, 1917, that the cost of coal sales in cents per ton per month was eighteen and twenty-two one-hundredths cents; that applying the same computation to all coal sales of said company for the year of 1917 he found the average selling cost to be eighteen and ninety-five one-hundredths cents. That further, for the year 1918, the average cost of actual coal sales of the company, in cents per ton per month amounted to seventeen and nine one-hundredths cents. And for the year 1919 the average cost per month of actual coal sales of said company was twenty-seven and six one-hundredths cents; and for the months of January, February and March, 1920, the average cost was nineteen and thirty one-hundredths cents. And defendant offers the de-
69 tailed statement prepared by the witness Frank C. Deckebach, dated May 17, 1920, covering said period from January 1, 1917, to March 31, 1920, showing all items and made as aforesaid from the original books, vouchers and other papers of said The Matthew Addy Company. And defendants' counsel states that said testimony and said analysis cost of coal sales is offered in evidence for the purpose of showing that defendant's price of three dollars and fifty cents per ton upon the sales stated in the indictments did not include a profit, as alleged in the indictment, in excess of fifteen cents per ton; and further, for the purpose of showing that said order of August 23, 1917, if it limited the gross price per ton upon the coal purchased prior to the order, by defendants, to a maximum of fifteen cents, was confiscatory and compelled defendant to dispose of its product without allowance for expense and a just compensation for its services.

And further, said evidence is offered for the purpose of showing that said order so interpreted did not conform to the act of Congress, and especially Paragraph 15 of Section 25 thereof, which provides that "in fixing prices for dealers the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

And in connection with said evidence defendants, and each of them, rely upon the grounds of unconstitutionality in respect to said act of Congress and said order of the President heretofore set up and relied on upon the motions to quash and demurrers to the indictments.

The statement referred to in the testimony of the witness Frank C. Deckebach is submitted herewith, marked for purposes of identification "Defendants' Exhibit C."

Thereupon the jury were returned into the jury box, and the trial proceeded as follows:

ROBERT A. COLTER being called as a witness for defendant stated he had been in the coal and coke office for about thirty years and

was familiar in 1918 with the publication known as the National Coal Jobbers' Association Bulletin. Witness in 1917 and 1918 had been president of the Cincinnati Coal Exchange, a branch of the Cincinnati Chamber of Commerce. The bulletins of the National Coal Jobbers' Association were not published until the organization of that association which was several months after August 1, 1917; there were no such publications in August or September,
70 1917. On cross examination, the witness stated the purposes for which the National Coal Jobbers' Association was formed, and that the time was not earlier than three months after August 23, 1917. Mr. B. N. Ford was a member of that association.

Thereupon the witness Robert A. Colter retired from the witness stand.

Mr. Graydon: That's all, Your Honor.

The Court: Has the Government anything further?

Mr. Roudebush: No, Your Honor.

The Court: Proceed to the jury.

Mr. Graydon: We renew the motions heretofore made at the close of the Government's case, each and all of them, in respect to all the counts, and on the grounds stated in the motions to quash and the demurrers and in support of said motions.

Overruled and exceptions noted.

The Court: Same rulings, respectively.

Mr. Samuels: May we reopen the question that was presented this morning to Your Honor on the interpretation of that Paragraph 16? There is an additional argument Mr. Cramer wishes to make, if Your Honor will permit us to reopen.

The Court: On what subject?

Mr. Samuels: The interpretation of the word "contract"—a question of statutory construction. I think Mr. Cramer has something additional to state.

The Court: I will be very glad to hear from either of the counsel that have anything further to say with regard to construction.

Mr. Samuels: I will ask that the jury be dismissed.

The Court: You may proceed if there is anything further to be said upon it.

Mr. Cramer: Mr. Graydon covered my argument that I intended to make, in his reargument after lunch.

Mr. Graydon: Will you hear from Mr. Samuels?

The Court: Yes.

Mr. Samuels: I ask that the jury be dismissed.

Thereupon the jury retired from the court room.

Mr. Graydon: Defendants called attention and suggested to offer in evidence the order of the President of August 21, 1917, fixing bituminous coal prices, and the order of August 23, 1917, fixing anthracite coal prices, and defining jobbers and fixing their commissions, and the order of September 6th——

71 The Court: Wouldn't you say their margins, rather than commissions?

Mr. Graydon: Yes, their margins; and the order of September 6, 1917, issued by the United States Fuel Administrator, and the order of October 6, 1917, of the Fuel Administrator, and the court stated that for the purposes of this case they would be noticed judicially.

Thereupon Mr. Samuels proceeded with his argument to the court, after which the jury were returned into the jury box and the following proceedings were had:

Mr. Graydon: If Your Honor please, we have some charges that we would like to have given specially or in the charge. I don't think there is anything new that Your Honor hasn't passed on (charges handed to the court).

The Court: The first will be refused.
Mr. Graydon: Note an exception.
The Court: The second will be refused.
Mr. Samuels: Exception.
The Court: The third will be refused.
Mr. Samuels: Exception.
The Court: The fourth will be refused.
Mr. Samuels: Exception.
The Court: The fifth will be refused.
Mr. Samuels: Exception.
The Court: The sixth will be refused.
Mr. Samuels: Exception.

The special charges requested by counsel for defendants refused by the court are as follows:

SPECIAL CHARGE No. 1.

There have been produced in evidence two contracts entered into by The Matthew Addy Company with the Bluefield Coal & Coke Company dated July 31st, 1917, in which 80 cars of coal were contracted to be purchased.

If you find from the evidence that the sales of coal made by the defendants which are complained of in the indictment were sales of the same coal contracted for purchase from the Bluefield Coal & Coke Company on July 31st, 1917, then such sales are exempted from the Act of Congress of August 10th, 1917, which law is known as the "Lever Act" and I therefore charge you as a matter of law that you must return a verdict of "Not Guilty."

72 **SPECIAL CHARGE No. 2.**

If you find from the evidence that the gross margin of 15 cents per ton for jobbers as fixed by the President on August 23rd, 1917 does not include defendants' costs of doing business and a just and

reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 3.

The purpose of the Lever Act upon which the indictments in these cases are found is to prevent the making of unreasonable profits in the sale of coal. What is a reasonable or unreasonable profit is for you to determine from all the evidence and all the circumstances of the cases and if you find from the evidence that the defendants did not make any unreasonable profits in the sales of coal complained of in the indictments, then I charge you that you must return a verdict of "Not Guilty."

SPECIAL CHARGE No. 4.

The order of the President of August 23, 1917 part of which is set forth in the indictment, applied only to jobbers and only in respect to coal dealt in by them, both bought and re-sold, after the issuance of the order of August 23, 1917; and unless the jury find beyond reasonable doubt, that the coal covered by the indictment was purchased by defendant The Matthew Addy Company after August 23, 1917, they shall find defendants, and each of them, not guilty.

SPECIAL CHARGE No. 5.

The Act of Congress contemplates that a jobber, for the buying and selling of coal, should be entitled to his expenses and a just compensation for his services, and unless the jury should find, that the order of August 23, 1917, provided for and allowed such expense and compensation, they shall find defendants, and each of them, not guilty.

SPECIAL CHARGE No. 6.

The indictment charges in each count that the price of $3.50 per ton demanded and received by the defendant The Matthew
73 Addy Company, included a profit or gross margin of 25 cents per ton, which was in excess of the profit or gross margin of 15 cents per ton fixed by said order of August 23, 1917. Profit, in these indictments, means the amount of sum remaining after the deduction of all cost and expense; and I charge you, that unless you find beyond a reasonable doubt, that said sum of 25 cents per ton added by defendant The Matthew Addy Company to its purchase price of $3.25 per ton, included a profit, as above defined, in excess of 15 cents per ton, you shall find defendants and each of them not guilty.

Thereupon, after counsel for both sides had completed their arguments to the court and jury, the court charged the jury, as follows:

The Court: Gentlemen of the jury, it becomes now my duty to charge you as to the law in this case. The law as I charge it to

you is binding upon you; you must take the law from the court. You are the sole judges of the facts. Applying the law as I shall give it to you to the facts as you find them to be from the evidence, you will reach your conclusion in this case.

The Congress of the United States, by a law approved August 10, 1917, enacted for the purpose of the national security and defense during the recent war, provided that the President should be, and he was, thereby authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold, either by producer or dealer, and to establish rules for the regulation of, and to regulate, the method of production, sale, shipment, distribution, apportionment or storage thereof among dealers and consumers, domestic and foreign. And pursuant to this authority so conferred upon him by the Congress of the United States, the President of the United States did, on the 23rd day of August, 1917, promulgate certain regulations relating to the supply of fuel, among others, as follows:

"A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15 cents per ton of 2,000 pounds."

74 You are considering now two cases simultaneously, each upon the evidence now before you. All of the evidence now before you is applicable, so far as it pertains thereto, to each of the indictments now being tried.

The first is against the defendant The Matthew Addy Company; the second is against the defendant Benjamin N. Ford. What I shall say generally to you has reference to each of these indictments and to each count thereof.

The presumption is that the defendant, that is to say each defendant, is innocent, and this presumption follows until it is overthrown by evidence of his guilt beyond a reasonable doubt. He is presumed to be innocent until he is proven guilty, so that you will begin your deliberations upon that basis, remembering that the mere fact that a defendant has been indicted by the grand jury in and of itself raises no presumption of the guilt of the defendant. One charged with the commission of an offense can be convicted only upon the evidence produced at his trial.

The burden of proof is upon the Government of the United States to prove the crime charged as to each count of these indictments, to prove the crime charged and all its essential elements, beyond a reasonable doubt. By a reasonable doubt is meant this: When you lack an abiding conviction to a moral certainty of the truth of the charge, considering all the evidence, then you have a reasonable doubt. A reasonable doubt is an honest uncertainty. If you have an honest uncertainty then you have a reasonable doubt. It is not a mere captious doubt, such as might, by some process of ingenuity,

be raised in the mind; to be a reasonable doubt it must be an honest uncertainty.

So far as circumstantial evidence is considered, each circumstance must be proven beyond a reasonable doubt, and the consequences must flow naturally from the circumstances thus established.

Now, what are the essential elements of the indictments which you have under consideration?

As to the indictment against The Matthew Addy Company, the law is set forth in the first count; but the law you will take from the court as I give it to you. The presidential order is set forth, but I have already charged you as to the exictence of the presidential order, and that you will assume to be established, for that
75 presidential order has the force of law, and it is, so far as your consideration of this case is concerned, a law, and you will assume it to be so.

The indictment states that The Matthew Addy Company was, in the months of September, October and Novemeber, 1917, a corporation organized and existing under the laws of the state of Ohio. That has been admitted by the defendant The Matthew Addy Company, so that you may assume that that is proven to be true. And that it was conducting, within the jurisdiction of this court, the business of a coal jobber. That likewise has been admitted, and of that no question is made. That continuously, during the months of September, October and November, 1917, a state of war existed between the United States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect. As to the existence of the war you need no proof of that; the court takes judicial notice, and you will therefore know, as you do know in your own minds, that the war was then in existence. The indictment then charges, taking the second count, the first count having been dismissed, that on or about the 7th day of September, in the year 1917, in the city of Cincinnati, county of Hamilton and state of Ohio, and within the jurisdiction of this honorable court, The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business in Naperville, Illinois—that is an essential averment—for a certain quantity of bituminous coal, to-wit, about 49.85 tons of 2,000 pounds each of Pocahontas run-of-mine coal—that is an essential averment, but it is not necessary that the quantity should be precisely that charged in the indictment—a price of three dollars and fifty cents per ton F. O. B. at the mines producing said coal—that is an essential averment—which said price of three dollars and fifty cents per ton included a profit or gross margin to it, the said The Matthew Addy Company, as such coal jobber, as aforesaid, of twenty-five cents per ton—that is an essential averment, and I charge you that "profit" as there used means the same as gross margin, that is, the difference between the purchase price and the selling price—which said profit or margin of twenty-five cents per ton was well known by said The Matthew Addy Company
76 to be in excess of the profit or gross margin of fifteen cents

per ton of 2,000 pounds permitted by the law, executive order or regulations above referred to, to be added to the purchase price of said jobber. That is an essential element, and it is essential for the Government to establish beyond a reasonable doubt that the defendant The Matthew Addy Company, knew of the regulation of the President which I have read to you fixing the gross margin at fifteen cents per ton. I charge you that the knowledge of its officer in control and direction of its activities as a coal jobber would be the knowledge of the corporation, if that has been shown. Such knowledge must be shown beyond a reasonable doubt. And the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made in good faith prior to said 23rd day of of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed. That is an essential averment of this indictment.

Now, gentlemen, the other counts are in the same terms. As to Counts Numbers 1 and 4, the evidence shows no offense committed within this jurisdiction, and your verdict on Counts Numbers 1 and 4 in the indictment against The Matthew Addy Company will be not guilty. Counts 3, 6, 8, 14, 19, 21, 22 and 23 are withdrawn from your consideration and dismissed, because the matters therein charged are charged also in other counts to be considered by you. You will, therefore, pass upon counts numbered 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20. I have indicated in lead pencil upon the indictment, upon the face of those counts, those which are omitted or dismissed. Count Number 2 charges a sale to Fred R. Kluckhohn, Naperville, Illinois, September 7, 1917; Count Number 5 charges a sale to The Wagner Manufacturing Company, Shelby County, Ohio, September 7, 1917; Count Number 7 charges a sale to the South End Supply Company, Chicago, Illinois, September 13, 1917; Count Number 9 charges a sale to Rice & Laub, of Batavia, Ohio, August 25, 1917; Count Number 10 charges a sale to Rice & Laub, Batavia, Ohio, September 8, 1917; Count Number 11 charges a sale to The Boye & Emmes Machine Tool Company, of Cincinnati, Ohio, September 14, 1917; Count Number 12 charges a sale to the Connersville Lumber Company, Connersville, Indiana, September 12, 1917; Count Number 15 charges a sale to Frank M. Dell,
77 of Indianapolis, Indiana, September 15, 1917; Count Number 16 charges a sale to the Whetstone Coal Company of Cincinnati, Ohio, September 11, 1917; Count Number 17 charges a sale to D. G. McFadden Grain Company of Rdgeville, Ohio, September 24, 1917; Count Number 18 charges the sale to Kraft & Co. of Cook County, Illinois, September 13, 1917; Count Number 20 charges a sale to Frey Brothers, of Chicago, Illinois, on September 20, 1917. The same rules are applicable as to each count.

Now, as to the indictment against Benjamin N. Ford, Counts Numbers 2, 3, 4, 6 and 11 are withdrawn from your consideration and dismissed, the matters therein charged being covered by other counts. You will therefore pass upon the remaining counts, Numbers 1, 5, 7, 8, 9, 10 and 12. Count Number 1 charges a sale to

Frey Brothers, Cook County, Illinois, September 10, 1917; Count Number 5 charges a sale to the Wagner Manufacturing Company, Sidney, Shelby County, Ohio, September 7, 1917; Count Number 7 charges a sale to Rice & Laub, Batavia, Ohio, August 26, 1917; Charge Number 8 charges a sale to Rice & Laub, Batavia, Ohio, September 8, 1917, one of those sales to Rice & Laub being August 26th, and the other September 8, 1917; Charge Number 9 charges a sale to Connersville Lumber Company, Connersville, Indiana, September 12, 1917; Charge Number 10 charges a sale to Consumers Coal & Supply Company, Elkhart, Indiana, September 13, 1917; Charge Number 12 charges a sale to Whetstone Coal Company, Cincinnati, Ohio, September 11, 1917.

The preliminary allegations in the first count of this indictment, as to the passage of the National Defense Act and the promulgation of the presidential order, which I have stated to you, are the same as in the other indictment.

It is also charged that The Matthew Addy Company was a corporation, as in the other indictment, in business as a coal jobber. It is further charged that Benjamin N. Ford, late of the said city of Cincinnati, county of Hamilton and state of Ohio, during all of said times was, and still is, the vice-president of said The Matthew Addy Company, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and contracts of said company insofar as they related to the conduct
78 of its business as a coal jobber; that continuously during the months of September, October and November, 1917, a state of war existed between the United States of America and the Imperial German Government and its allies, and the law, orders and regulations above referred to were in full force and effect.

It is an essential allegation to be proven that the said Benjamin N. Ford was vice-president, and in such official capacity had charge, control, supervision and direction of the activities, negotiations and contracts of the company insofar as they related to the conduct of its business as a coal jobber.

It is further presented that within this jurisdiction, on the 10th of September, 1917, Benjamin N. Ford, acting in his capacity as aforesaid with The Matthew Addy Company, doing business as a coal jobber, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Frey Brothers, doing business in Chicago, Cook County, Illinois, for a certain quantity of bituminous coal, to-wit, about 50.30 tons of 2,000 pounds each of Pocahontas run-of-mine coal, a price of three dollars and fifty cents per ton, F. O. B. at the mines producing said coal, which said price of three dollars and fifty cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid, of twenty-five cents per ton—all of that is a material and essential allegation of the indictment; those elements are all essential to be proven by the Government beyond a reasonable doubt—which said profit or margin of twenty-five cents per ton was, and was well known by the said Benjamin N. Ford,

vice-president, as aforesaid, of said The Matthew Addy Company, to be in excess of the profit or gross margin of fifteen cents per ton of 2,000 pounds permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber. That, gentleman of the jury, is an essential element to be established beyond a reasonable doubt. It must appear that the said Benjamin N. Ford so knew, that he had knowledge of the presidential regulations fixing the margin, the gross margin of the jobber at fifteen cents per ton. And, that said The Matthew Addy Company did not have any contract with said Frey Brothers, made in good faith prior to said 23rd day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed,
79 which fact was well known to the said Benjamin N. Ford, vice-president of said The Matthew Addy Company, as aforesaid. Those also are essential elements to be established.

Now, the other counts are in substance the same, the names of the purchasers, the exact quantities, and the precise dates of the sales, of course, varying in the different counts as they also do in the indictment against the defendant The Matthew Addy Company.

A corporation, gentlemen of the jury, acts by its officers. If the defendant The Matthew Addy Company, acting by its officer duly authorized to have charge, control, supervision and direction of the activities of said company, so far as they related to the conduct of its business as a coal jobber, was guilty of the offenses charged in the respective counts in the indictment against that company, then the company itself was guilty. One who aids, abets, counsels, commands, induces or procures the commission of an offense defined in any law of the United States is himself a principal therein. And so, if an offense committed by a corporation was aided, abetted, counseled, induced, or procured by an officer thereof, the fact that the corporation may be found guilty of such an offense does not preclude the conviction of its officer; or, vice versa, the conviction of the officer does not preclude the conviction of the corporation thereon.

Now, as to each of these indictments, if you find that each of the essential elements of each count, respectively, of these indictments, as I have explained them to you, has been proven true beyond a reasonable doubt, you will find a verdict of guilty upon such counts, respectively. On the other hand, unless you do find that each essential element of a count of this indictment has been proven true beyond a reasonable doubt, then you will find a verdict of not guilty as to each count concerning which that is so, respectively.

You, gentlemen of the jury, are not concerned with the penalty to be inflicted in case the defendant is found guilty. That responsibility is upon the court. You simply have to say, upon the evidence and under the law as I have given it to you, as to each count in each of these indictments, whether the defendant has been proven guilty thereon beyond reasonable doubt or not.

You are the sole judges of the credibility of the witnesses here produced before you. You may consider, in judging their
80 credibility, their demeanor upon the witness stand; any bias or prejudice that they may have shown, if they have shown any; their interest in the outcome of this trial, if any they have; the probability, the reasonableness of their testimony. You will give all the circumstances bearing upon their testimony consideration, and then you will accord to the testimony of each witness such credit as you find it entitled to receive. You are not necessarily, or as a matter of law, bound by the greater number of witnesses, but of course, in this case, except as to one issue, the defendant has produced but one witness. However, you are not necessarily or as a matter of law bound by the greater number of witnesses, although, of course, that is a matter for you to consider. You can not arbitrarily, and without being able to give yourself a good reason therefor, reject any of the testimony of any witness.

Gentlemen of the jury, you will now take each of these cases, give consideration thereto, fairly, calmly and impartially, and when you have arrived at your conclusions you will report to the court. I will send you the list of counts which have been withdrawn from your consideration and those which still remain to be considered by you.

Is there anything further, gentlemen of counsel?

Mr. Graydon: If Your Honor please, in connection with the statement made to the jury on the issue of knowledge, that defendant produced only one witness, I would like to ask Your Honor to call attention of the jury to the fact that the Government produced only one witness.

The Court: Yes. Gentlemen of the jury, I call your attention to the fact that likewise the Government produced but one witness on the subject.

Mr. Graydon: We would like to reserve an exception to that part of the charge in which the court defined "profit" as being equivalent to gross margin, and also a general exception to the charge.

I would like, Your Honor—I would like to suggest also that Your Honor, while the court stated very clearly that it was necessary for the Government to establish knowledge of the defendant of the existence of the regulation beyond a reasonable doubt, I don't think the court made it clear that that knowledge must have existed in respect to each count at the time of the transaction in that count, respectively.

The Court: I thought I made that clear. However, gentlemen, I will amplify that charge, and say that the knowledge
81 which must be shown of the regulation of the President must have existed at the time of the transactions related in each count respectively.

You may retire, gentlemen of the jury, and deliberate upon your verdict.

Defendants and each of them excepted to the general charge.

Whereupon the jury returned a verdict of guilty against each of the defendants upon the several counts in indictments submitted by the court to the jury, as appears of record; to which verdict each of the defendants then and there excepted, and afterwards, at said term and within the time allowed by law, each defendant filed a motion to set aside the verdict and for a new trial, upon consideration whereof the court overruled said motions as also appears of record to which each of said defendants excepted.

Whereupon said defendants filed a motion in arrest of judgment upon consideration whereof the court overruled said motions, all as appears of record, to which rulings of the court the defendants and each of them excepted and thereupon the court entered judgment and pronounced sentence, as also appears of record.

And thereupon, to-wit, upon this 26th day of November, 1920, the court having heretofore by orders duly entered extended the time for prrparation, signing, allowance and filing of a Bill of Exceptions to December 15, 1920, present and submit this their Bill of Exceptions and pray that the same be allowed, signed and sealed, and made a part of the record, and the assignments of error having been filed, and said bill of exceptions being found by the court to be true, the same is hereby allowed, settled, signed and sealed and made a part of the record in this case on this 26th day of November, 1920, within the time allowed as aforesaid. Peck, United States District Judge of said District.

82 **PETITION FOR WRIT OF ERROR.**

[Filed July 6, 1920.]

Defendant, Benjamin N. Ford, prays for a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment entered and sentence pronounced against him in this proceeding on June 23, 1920, and he files herewith an assignment of errors and prays that the writ of error shall operate as a supersedeas and that he be admitted to bail pending the determination of proceedings on said writ of error. Lawrence Maxwell, Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon, Attorneys for Benj. N. Ford.

ASSIGNMENT OF ERRORS.

[Filed July 6, 1920.]

Defendant, Benjamin N. Ford, assigns as errors prejudicial to him, in the record, proceedings, judgment and sentence of the court in the above entitled cause, that the court erred:

1. In overruling and not sustaining the motion to quash the indictment and each and every count thereof, which motion should have been sustained on each of the following grounds:

Said indictment and each of its several counts is insufficient in law and fact.

Said indictment and each of its several counts charges in
83 each count several separate and distinct alleged offenses and is bad for duplicity.

Said indictment and each of its several counts charges no indictable offense under the laws of the United States.

That the averments in said indictment as to the form of same and the manner in which said offense is charged, are so vague, indefinite, uncertain, argumentative and misleading that the defendant is not properly informed of the charge against him or what he shall meet at the trial and can not prepare his defense.

That the indictment and each of its several counts, alleges a violation of the orders, proclamations, publications and regulations of the President of the United States of August 21, 1917, and August 23, 1917, and those subsequent thereto, without stating what subsequent regulations, proclamations, etc., were violated.

That the indictment is not in the form of nor does it conform to the Act of Congress alleged to have been violated.

2. In overruling and not sustaining the demurrer to the indictment and each count thereof, which demurrer should have been sustained on each of the following grounds:

That the Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator, are indefinite, uncertain and misleading and do not clearly describe the offense.

That the Act of Congress and the rulings, regulations, etc., are unconstitutional for the following reasons, to-wit:

They violate the Fifth Amendment to the Constitution of the United States, in that defendant is deprived of his property without due process of law.

They violate the tenth amendment to the Constitution of the United States in that they interfere with the rights of the respective States, as to regulation of industries within those States.

The Act of Congress of August 10, 1917, violates Section 1, of Article 1, Section 1 of Article 2 and Section 1 of Article 3 of the Constitution of the United States in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

84 That the Act of Congress violates clause 1 of Sec. 8, of Article 1, and clause 11 of Section 8, of Article 1 of the Constitution of the United States in that, it is an abuse of the power given to Congress to provide for the national security and defense.

The ruling of the President of the United States under date of October 6, 1917, violates clause 3 of Section 9 of Article 1 of the Constitution of the United States in that it is an ex post facto law.

3. In sustaining the objection of counsel for the Government to defendant's offer to prove that the profit of The Matthew Addy Company upon each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15 cents per ton of 2,000 lbs.

4. In overruling and not sustaining defendant's motion at the close of the Government's evidence to dismiss the cause and discharge defendant.

5. In overruling and not sustaining defendant's motion at the close of all the evidence to instruct the jury to return a verdict for defendant.

6. In charging the jury that the word "profit" in the indictment, at each of the places where said word appears was the equivalent of the words "gross margin," and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment in excess of 15 cents.

7. In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment the coal had been purchased by The Matthew Addy Company prior to that day and prior to August 10, 1917.

8. In overruling the motion for a new trial.

9. In overruling the motion in arrest of judgment when the same should have been sustained on each of the grounds stated therein in respect to each of counts 1, 5, 7, 8, 9, 10 and 12, on which defendant was found guilty, which grounds were as follows:

The provisions of the Act of Congress of August 10, 1917, 40 Stat., 276, known as the National Defense (Lever) Act, and especially Sections 1, 2, 3, 4 and 25 thereof, and the promulgation of the order of the President issued August 23, 1917, and especially Sections 1 and 2 thereof, are, as construed and applied by the judgment of the court, unconstitutional and void, in that they attempt to create offenses and impose penalties repugnant to the Constitution of the United States, especially Section 1 of Article 1, Section 1 of Article 2 and Section 1 of Article 3; and to the provisions of the Fifth Amendment that no person shall be deprived of life, liberty and property without due process of law; and to the provisions of the Sixth Amendment that in all criminal cases the accused is entitled to be informed of the nature and cause of the accusations against him; and to the Tenth Amendment reserving to the States, or to the people thereof, powers not delegated to the United States; and to Clause 1 of Sec. 8 of Art. 1, and Clause 11 of Sec. 8 of Art. 1 of the Constitution of the United States.

The averments of each of said counts are too general, vague, uncertain and indefinite to state an offense, or to inform defendant of the nature and cause of the accusation or to apprise him, with such reasonable certainty of the offense with which he is charged, and which he may be expected to meet on a trial, as to enable him to make his defense.

Each of said counts undertakes to charge separate and distinct offenses, and is bad for duplicity.

Upon certain of said counts, conviction was had for acts committed outside the jurisdiction of the court.

10. The District Court erred in entering final judgment against defendant.

Wherefore defendant prays that the judgment of the District Court may be reversed. Lawrence Maxwell, Nelson B. Cramer, Julius R. Samuels, Joseph S. Graydon, Attorneys for Defendant, Benjamin N. Ford.

86 **ORDER ALLOWING WRIT OF ERROR.**

[Filed July 6, 1920.]

This sixth day of July, A. D. 1920, came the defendant Benjamin N. Ford, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, to operate as a supersedeas, and filed therewith assignments of error.

On consideration whereof the court allows and signs a writ of error as prayed for to operate as a supersedeas. Peck, J.

WRIT OF ERROR.

[Filed July 6, 1920.]

UNITED STATES OF AMERICA,
Sixth Judicial District, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between The United States of America, plaintiff, and Benjamin N. Ford, defendant, a manifest error hath happened, to the great damage of said Benjamin N. Ford, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the
87 party aforesaid in this behalf, do command you, if judgment be therein given, then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 5th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 6th day of July in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the

United States of America the one hundred and forty-fifth. ——, Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by Peck, J., Judge U. S. District Court, S. D. O.

CITATION.

[Filed July 6, 1920.]

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear
88 at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 5th day of August next, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein Benjamin N. Ford is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 6th day of July, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fifth. Peck, Judge U. S. District Court S. D. O.

Service of the within Citation hereby acknowledged this 6th day of July, 1920. James R. Clark, U. S. Attorney S. D. O., by Mr. Thos. H. Morrow, Asst. Dist. Attorney.

ORDER EXTENDING TIME.

[Filed July 6, 1920.]

On application of defendant Benjamin N. Ford it is ordered that the writ of error from the United States Circuit Court of Appeals for the Sixth Circuit allowed upon his petition shall operate as a supersedeas, that the time for making return to said writ of error and for the filing and allowance of a bill of exceptions be extended to October 1, 1920, and that said defendant remain
89 at liberty under the recognizance heretofore entered into by him, for his appearance before this court from day to day as

the court may require, pending the determination of proceedings on said writ of error. Peck, J.

ORDER EXTENDING TIME.

[Filed September 25, 1920.]

Upon application of defendant and for good cause shown the time for making return to the writ of error and for filing and allowance of a bill of exceptions is extended to November 1, 1920.

ORDER EXTENDING TIME.

[Filed October 29, 1920.]

Upon application of the defendant and for good cause shown,
the time for making return to the Writ of Error and for
90 filing and allowance of a Bill of Exceptions is extended to
December 15, 1920. Peck, J.

PRAECIPE.

[Filed November 26, 1920.]

To the Clerk:

The defendant, Benjamin N. Ford, desires the following matters incorporated into the record:

Indictment.
Motion to Quash Indictment.
Order overruling Motion to Quash Indictment.
Demurrer to Indictment.
Order Overruling Demurrer to Indictment.
Bill of Exceptions and Exhibits.
Motion for a New Trial.
Order Overruling Motion for a New Trial.
Motion in Arrest of Judgment.
Order Overruling Motion in Arrest of Judgment.
Bond.
Petition for Writ of Error and Writ of Error.
Assignment of Errors.
Order allowing Writ of Error.
Citation on Writ of Error.
Order of July 6, 1920, extending time for making return to writ of error and for filing and allowance of bill of exceptions to October 1st.
Order of September 25, 1920, extending time for making return to writ of error and for filing and allowance of bill of exceptions to November 1, 1920.
Order of October 29, 1920, extending time for making return
to writ of error and for filing and allowance of bill of
91 exceptions to December 15, 1920.

Opinion on Motion to Quash February 26, 1920.
Opinion on Demurrer of May 29, 1920.
Opinion on Motions for New Trial June 23, 1920. Maxwell & Ramsey, Attorneys for Benjamin N. Ford, Defendant. November 26, 1920.

Service of a copy of the foregoing præcipe is hereby acknowledged. Allen C. Roudebush, Asst. United States Attorney.

EXHIBITS.

Government Exhibits.

1. Coal order dated July 31, 1917, No. 5668, The Matthew Addy Co. to Bluefield Coal & Coke Company, 40 cars R. O. M. coal @ $3.25 per ton, 2,000 pounds f. o. b. mines.
2. Coal order dated July 21, 1917, No. 5667, The Matthew Addy Co. to Bluefield Coal & Coke Company, 40 cars R. O. M., $3.25 per ton 2,000 pounds f. o. b. mines.

Exhibit No 1.

3. Invoice dated November 9, 1917, The Matthew Addy Co. to Boye & Emmes Machine Tool Co. Red Ash Pocahontas lump coal, weight 118,300. Net amount $207.03.
4. Cancelled check drawn to order of The Matthew Addy Co. by The Boye & Emmes Machine Tool Co. dated December 4, 1917, in amount of $207.03.
92 5. Freight bill dated November 19, 1917, covering N. & W. car 85,558, to Boye & Emmes Machine Tool *Tool* Co., R. O. M. coal, weight 115,300, freight $73.54, war tax $2.22, collectible $76.16.
6. Invoice dated October 1, 1917, The Matthew Addy Co. to Whetstone Coal Co., 1 car Pocahontas R. O. M. coal, weight 85,400, net amount $149.45.
7. Check (cancelled) drawn to order of Matthew Addy Company by Whetstone Coal Co., dated November 1, 1917, in amount of $149.45.
8. Acceptance of order, addressed to Whetstone Coal Co. by The Matthew Addy Co. dated September 11, 1917, 1 car grade R. O. M., price $3.50 per ton of 2,000 pounds f. o. b. cars mines.
9. Invoice dated September 25, 1917, from The Matthew Addy Co. to Rice & Laub. Pocahontas lump coal, weight 99,500, net $174.13.
10. Memorandum dated September 8, 1917, 2 R. O. M. $3.50 mines.
11. Post card notice addressed to Rice & Laub, Batavia, Ohio, dated September 26, 1917, signed by The Matthew Addy Company, 1 car Pocahontas.
12. Invoice dated October 22, 1917, The Matthew Addy Company to Alexander Lumber Co., 1 car Pocahontas R. O. M. coal, net amount $177.63.

13. Confirmation of order from Alexander Lumber Co. to The Matthew Addy Co., 1 50 ton car genuine No. 3 Pocahontas mine run coal @ $3.50, billing price $6.75.

14. Invoice dated October 26, 1917, The Matthew Addy Company to Frank M. Dell, 1 car grade smokeless Red Ash R. O. M. coal, weight 100,300 pounds, net amount $175.63.

15. Cancelled check drawn to order of The Matthew Addy Company by Frank M. Dell, dated November 9, 1917, in amount of $175.53.

93 16. Acceptance of order, dated September 17, 1917, from The Matthew Addy Company to Frank M. Dell, 2 cars grade R. O. M., price $3.50 per ton 2,000 pounds, f. o. b. cars mines.

17. Acceptance of order, dated September 24, 1917, from The Matthew Addy Co. to D. G. McFadden Grain Co., 1 car grade R. O. M., price $3.50 per ton of 2,000 pounds, f. o. b. mines.

18. Invoice dated October 22, 1917, from The Matthew Addy Co. to Kraft & Company, 1 car Pocahontas R. O. M. coal, weight 105,000 f. o. b. mines, price $3.50, net amount $183.75.

19. Invoice dated October 24, 1917, from The Matthew Addy Co. to Kraft & Co., 1 car Pocahontas R. O. M. coal, weight 101,200, f. o. b. mines, price $3.50, net amount $177.10.

20. Acceptance of order, dated September 11, 1917, The Matthew Addy Co. to Frey Bros., 4 cars grade R. O. M., price $3.50 per ton 2,000 pounds, f. o. b. mines.

21. Invoice dated November 13, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 100,000, f. o. b. mines, price $3.50, net amount $175.

22. Invoice dated November 8, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 102,500, f. o. b. mines, price $3.50, net amount $179.38.

23. Invoice dated October 25, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 84,700, f. o. b. mines, price $3.50, net amount $148.23.

24. Invoice dated October 8, 1917, from The Matthew Addy Co. to Frey Bros., 1 car Pocahontas R. O. M. coal, weight 84,700, f. o. b. mines, price $3.50, net amount $148.23.

26. Cancelled check drawn to order of The Matthew Addy
94 Co. by Frey Bros., dated December 3, 1917, in amount of $324.28.

27. Freight bill dated October 29, 1917, covering N. & W. Car 53,572, addressed to Frey Bros. Co. by P. C. C. & St. L. R. R. Co., weight 100,000 pounds, $115.25.

28. Freight bill, P. C. C. & St. L. R. R. Co., to Frey Bros., covering N. & W. Car 53,572, dated October 28, 1917, 100,000 pounds, $10.06.

29. Freight Bill, P. C. C. & St. L. R. R. Co. to Frey Bros., covering N. & W. Car 47,919, dated November 5, 1917, weight 84,700, total $93.17.

30. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 4, 1917, covering N. & W. Car 47,919, weight 84,700, amount $2.18.

31. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 19, 1917, covering N. & W. Car 74,444, weight 102,500, amount $116.13.

32. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 19, 1917, covering N. & W. Car 74,444, 102,500 pounds, amount $2.64.

33. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 26, 1917, covering N. & W. Car 73,367, 120,000 pounds, amount $113.30.

334. Freight bill, P. C. C. & St. L. R. R. Co. to Frey Bros., dated November 27, 1917, covering N. & W. Car 73,367, 100,000 pounds, amount $2.58.

35. Invoice dated November 12, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 1 car Pocahontas R. O. M. coal, weight 85,400, price $3.50 mines, net amount $149.45.

36. Invoice dated October 6, 1917, from The Matthew Addy Co. to F. R. Kluckhohn, 1 car Pocahontas R. O. M. coal, weight 99,700, price $3.50 mines, $174.40.

37. Acceptance of order, dated September 8, 1917, from
95 The Matthew Addy Co. to F. R. Kluckhohn, 2 cars grade R. O. M., price $3.50 per ton f. o. b. cars mines.

38. Cancelled check drawn to order of The Matthew Addy Co., signed by F. J. Kozlowski, dated October 9, 1917, in amount of $154.70.

39. Invoice dated September 10, 1917, from The Matthew Addy Co. to West Pullman Fuel Co., 1 car Pocahontas R. O. M. coal, weight 88,400, price $3.50 mines, net amount $154.70.

40. Invoice dated November 16, 1917, from The Matthew Addy Co. to South End Supply Co., 1 car Pocahontas R. O. M. coal, weight 101,400, price $3.50 mines, net amount $177.45.

41. Invoice dated November 12, 1917, from The Matthew Addy Co. to South End Supply Co., 1 car Pocahontas R. O. M. coal, weight 108,800, price $3.50 mines, net amount $190.40.

Defendant's Exhibits.

A. Letter, The Alexander Lumber Co. to A. J. Devlin, dated Chicago, October 18, 1919.

B. (For identification only) Copy of Lane-Peabody Agreement.

C. (For identification only) Statement entitled: "The Matthew Addy Company Analysis Cost of Coal Sales January 1, 1917, to March 31, 1920."

96 DEFENDANT'S EXHIBIT "A."

(The Alexander Lumber Co.)

Chicago, Oct. 18th, 1919.

A. J. Devlin, Special Agt., Department of Justice, Bureau of Investigation, P. O. Box 766, Cincinnati, O.

DEAR SIR: Replying to your favor October 16th, the writer I. K. McClatchie handled the transaction referred to in our letters of October 15th and 18th with the Chicago office of Matthew Addy Co. Yours truly, The Alexander Lumber Co. I. K. McClatchie.

DEFENDANT'S EXHIBIT "B."

(For Identification.)

Department of the Interior, Office of the Secretary.

June 28, 1917.

Memorandum for the Press.

The following papers show what has been done through the co-operation of the coal operators in the matter of reasonable coal prices.

June 28, 1917.

DEAR MR. PEABODY: I feel that the present extremely high prices on coal reqquire immediate action by the coal operators, and therefore would urge upon you that they should be reduced at
97 once and maximum prices fixed which would apply to sales on and after July 1, 1917, and continue until such time as the investigation which you propose into costs and conditions shall warrant a reduction or increase. These prices should not be used to affect present contracts or apply to export or foreign trade. In other worth the people of the United States should have, as I urged upon the operators the other day, immediate relief and knowledge of their disposition to make a reasonable price irrespective of the possibilities of obtaining higher prices. This would be regarded by the people as meeting the situation promptly and wisely if the prices materially cut those which exist. Cordially yours, Franklin K. Lane.

Mr. F. S. Peabody, Chairman, Committee on Coal Production, Council of National Defense.

Whereas under the Act of Congress approved August 29, 1916, providing that a Council of National Defense be established "for the co-operation of the industries and resources for the national security and welfare, to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor," authority

is given to the Council to organize subordinate bodies for its assistance and co-operation, and

Whereas, pursuant to this authority the Council of National Defense has appointed Mr. Francis S. Peabody, Chairman of and with authority to appoint a Committee on Coal Production, representative of the coal producing districts of the United States, and,

Whereas a great national emergency now exists in the fuel supply of the nation, and as the coal operators and miners of the United States desire to co-operate as closely as possible with the Government, and as the Department of the Interior, the Federal Trade Commission, and the Committee on Coal Production have given close and intelligent study to the necessities now existing.

Therefore Be It Resolved, That it is the sense of this meeting that a committee of seven for each coal producing state and an additional committee of seven appointed by the representatives of the anthracite industry be appointed by the representatives of
98 each state now attending this convention, to confer with the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense, to the end that production be stimulated and plans be perfected to provide adequate means of distribution, and, further, that these committees report forthwith to the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense costs of and conditions surrounding the production and distribution of coal in each district, and that these committees are authorized, in their discretion, to give assent to such maximum prices for coal f. o. b. cars at mines in the various districts as may be named by the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense.

Adopted June 28, 1917.

This Convention by resolution heretofore adopted having requested the Secretary of the Interior, the Federal Trade Commission and the Committee on Coal Production to fix a fair and reasonable price at which the several operators in the several coal districts of the United States shall sell coal; do hereby further authorize said government representatives, so named in said resolution, to forthwith issue a statement fixing a tentative maximum price which, in their judgment, is fair an dreasonable as applied to the several coal districts, at which coal shall be sold from and after the first day of July next and until the accurate costs have been ascertained and a fair and reasonable price based thereon fixed by said government agencies designated under said resolution.

To this end therefore be it resolved that the several states, here represented, do present to the chairman of this Convention a suggestion, for use by said agencies in fixing the price which the several interests here represented feel should be the fair and reasonable price to be so tentatively fixed by the said agencies.

Adopted June 28, 1917.

96 DEFENDANT'S EXHIBIT "A."

(The Alexander Lumber Co.)

Chicago, Oct. 18th, 1919.

A. J. Devlin, Special Agt., Department of Justice, Bureau of Investigation, P. O. Box 766, Cincinnati, O.

DEAR SIR: Replying to your favor October 16th, the writer I. K. McClatchie handled the transaction referred to in our letters of October 15th and 18th with the Chicago office of Matthew Addy Co. Yours truly, The Alexander Lumber Co. I. K. McClatchie.

DEFENDANT'S EXHIBIT "B."

(For Identification.)

Department of the Interior, Office of the Secretary.

June 28, 1917.

Memorandum for the Press.

The following papers show what has been done through the co-operation of the coal operators in the matter of reasonable coal prices.

June 28, 1917.

DEAR MR. PEABODY: I feel that the present extremely high prices on coal reqquire immediate action by the coal operators, and therefore would urge upon you that they should be reduced at
97 once and maximum prices fixed which would apply to sales on and after July 1, 1917, and continue until such time as the investigation which you propose into costs and conditions shall warrant a reduction or increase. These prices should not be used to affect present contracts or apply to export or foreign trade. In other worth the people of the United States should have, as I urged upon the operators the other day, immediate relief and knowledge of their disposition to make a reasonable price irrespective of the possibilities of obtaining higher prices. This would be regarded by the people as meeting the situation promptly and wisely if the prices materially cut those which exist. Cordially yours, Franklin K. Lane.

Mr. F. S. Peabody, Chairman, Committee on Coal Production, Council of National Defense.

Whereas under the Act of Congress approved August 29, 1916, providing that a Council of National Defense be established "for the co-operation of the industries and resources for the national security and welfare, to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor," authority

is given to the Council to organize subordinate bodies for its assistance and co-operation, and

Whereas, pursuant to this authority the Council of National Defense has appointed Mr. Francis S. Peabody, Chairman of and with authority to appoint a Committee on Coal Production, representative of the coal producing districts of the United States, and,

Whereas a great national emergency now exists in the fuel supply of the nation, and as the coal operators and miners of the United States desire to co-operate as closely as possible with the Government, and as the Department of the Interior, the Federal Trade Commission, and the Committee on Coal Production have given close and intelligent study to the necessities now existing.

Therefore Be It Resolved, That it is the sense of this meeting that a committee of seven for each coal producing state and an additional committee of seven appointed by the representatives of the anthracite industry be appointed by the representatives of
98 each state now attending this convention, to confer with the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense, to the end that production be stimulated and plans be perfected to provide adequate means of distribution, and, further, that these committees report forthwith to the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense costs of and conditions surrounding the production and distribution of coal in each district, and that these committees are authorized, in their discretion, to give assent to such maximum prices for coal f. o. b. cars at mines in the various districts as may be named by the Secretary of the Interior, the Federal Trade Commission, and the Committee on Coal Production of the Council of National Defense.

Adopted June 28, 1917.

This Convention by resolution heretofore adopted having requested the Secretary of the Interior, the Federal Trade Commission and the Committee on Coal Production to fix a fair and reasonable price at which the several operators in the several coal districts of the United States shall sell coal; do hereby further authorize said government representatives, so named in said resolution, to forthwith issue a statement fixing a tentative maximum price which, in their judgment, is fair an dreasonable as applied to the several coal districts, at which coal shall be sold from and after the first day of July next and until the accurate costs have been ascertained and a fair and reasonable price based thereon fixed by said government agencies designated under said resolution.

To this end therefore be it resolved that the several states, here represented, do present to the chairman of this Convention a suggestion, for use by said agencies in fixing the price which the several interests here represented feel should be the fair and reasonable price to be so tentatively fixed by the said agencies.

Adopted June 28, 1917.

June 28, 1917.

MY DEAR MR. PEABODY: I have just learned of the action of the coal operators, and I wish to express my appreciation of the generous, prompt and patriotic manner in which they have acted. They have dealt with the situation in the way that I had hoped they would, as large men dealing with a large question. They manifestly see that this is no time in which to consider primarily the opportunities which the war gives for personal aggrandizement. We must gain for each by gaining for all. The Country is in a mood for sacrifice. It is intent upon the success of the war and is willing to do everything needed to give insurance to the world against a repetition of this awful condition.

Will you not be good enough to express to the coal men my appreciation of the spirit they have shown in determining that their prices shall be reduced so that the industries of the country may not feel hampered, and the people may not feel that their spirit is broken down by the thought that this is to be a war for individual advantage instead of self-protection. I felt from the moment of my talk to them that no body of men more truly represented the high purpose to yield personal desire for general good than did they. Now I trust that we shall immediately put into concrete form the spirit of your resolution. Cordially yours, Franklin K. Lane.

Hon. F. S. Peabody, Chairman Committee on Coal Production, Council of National Defense.

Memorandum for the Press.

Department of the Interior, Office of the Secretary.

June 28, 1917.

As a result of the conference between the mine operators, the Secretary of the Interior, Federal Trade Commissioner Fort, Chairman Peabody and the committee on coal production of the Council of National Defense, the following reductions were made to go into effect July 1 next in the prices of coal. This according to the statement of Director George Otis Smith of the Geological Survey of the Interior Department will effect a reduction to the consumers east of the Mississippi River of fifteen million dollars a month, based on the output of free coal in May of this year. These prices are maximum prices per ton of 2,000 pounds aboard the cars at mine, pending further investigation. These prices do not affect in any way contracts in existence or sales of coal for foreign or export trade.

The operators tendered to the government a reduction from these reduced prices of fifty cents per ton for coal that the government may need.

No action was taken upon anthracite prices because of the fact that these prices had already been acted upon by the Federal Trade Commission.

Twenty-five cents per net ton was fixed as the maximum price for coal jobbers' commission with only one commission, no matter how many jobbers' hands the coal may pass through.

On account of an inadequate representation of operators west of the Mississippi River, no maximum prices were fixed for coal from those districts. A supplementary statement will be issued within a few days covering prices on coal produced in those districts.

The action taken at their conference, brings about the following results:

Present prices on bituminous coal mined in Pennsylvania have ranged from $4.75 to $6.00. Under the ruling the price is reduced to $3.00 for mine run and $3.50 for domestic lump, egg and nut.

The present range of prices in West Virginia is from $4.50 to $6.00; price reduced to $3.00 for mine run and $3.50 for domestic lump, egg and nut.

The range of prices for Ohio coal has been from $4.50 to $5.00; prices reduced to: No. 8 district, the thick vein Hocking and Cambridge districts, $3.00 for mine run and $3.50 for domestic lump, egg and nut; thin vein Hocking, Pomeroy, Crooksville, Coshocton, Columbiana County, Tuscarawas County, Amsterdam-Bergholz District, $3.25 for mine run and $3.50 for domestic lump, egg and nut; the Massillon and Palmyra districts and Jackson County, $3.50 for all grades of coal.

The prevailing prices in Alabama have been from $5.50 to
101 $5.75; prices reduced to: Cahaba and Black Creek, $4.00; Pratt, Jaeger and Corona, $3.50; Big Seam, $3.00 for all grades.

The prevailing prices for coal mined in Maryland have been from 5.75 to $6.00; reduced prices will be $3.00 for mine run and $3.50 for domestic lump, egg and nut.

The prevailing prices on coal mined in Virginia have been $4.50 to $5.00; reduced price, $3.00 for mine run and $3.50 for lump, egg and nut.

The prevailing prices on coal mined in Kentucky have been from $4.00 to $4.50; reduced price, $3.00 for mine run and $3.50 for the domestic sizes.

The prevailing prices on coal mined in Illinois and Indiana have been from $3.50 to $4.00; reduced price, $2.75 for mine run and steam sizes and $3.50 for screened domestic sizes.

The prevailing prices on coal mined in Tennessee have been from $4.50 to $5.00; reduced price, $3.50 for all sizes.

At the conclusion of the conference Secretary Lane said:

GENTLEMEN: This is a very novel proceeding. I think I am within the fact when I say that no such hearing or gathering as this has ever been held in the United States before, or perhaps in the world. You are, I hope, pioneers in a good movement. I come from the land of pioneers, the far Western country, where we look back with respect and admiration and some reverence upon those who crossed the hard and stony and waterless places to the richer spots beyond. And I hope that you will be looked back upon not only by

those who succeed you in the coal business, but by the industries o
the United States, with respect and admiration for the manner i
which you have acted at this conference. You have responded a
men should, to a call made upon you in the name of the people o
the United States. You are not a removed class. You are of us
You belong to the people. Most of you are men who were not bor
to wealth. You came up out of the soil like the rest of us and yo
have shown a sympathy and an understanding of your relations wit
the people from which you spring. That is the essential quality i
democracy. Unless we can maintain in our minds always a con
sciousness of the source of power in this country, democracy is a
failure. There is a strong contention made that this government
can not so organize itself as to meet to the full the demand
102 that are and are to be made upon it, that other forms of gov
ernment in times of stress or, in fact, in any times, are more
competent and more efficient, because there is the strong hand of the
government above, threatening, menacing, compelling. If we in the
United States are to work out problem economic, social, as we have
worked out our problem political, we must work it out in my judg
ment in the spirit in which you have worked—with sympathy, with
recognition of those whom you serve. There is a kind of corporation
in this country that we know as a public utility. A public utility is
one that is at the service of anyone and must render him the kind
of service that it holds out to give. In the biggest and broadest
sense, each one of you in running a coal mine is managing a public
utility, because the public is dependent upon you. And this world is
going forward and not backward, it is going to keep its confidence in
democracy, if the men who have the management of industry and
the men who give direction to the thought of the country have in
their hearts always the welfare of the people. The one thing that
will turn us back is the exercise of arbitrary power by those who have
power and who exercise it ruthlessly. You have been up against an
extremely odd situation. And now you have gathered here and met
that situation in man fashion. I think you have reason to be proud
of what you have done. Speaking for Governor Fort and for Mr.
Peabody and his Committee and for myself, we are proud of what
you have done. You have said to the American people that within
your power, exercising your judgment, protecting yourselves, you
will not be oblivious to the rights of those whom you serve; you will
within your power, protect them. That is the spirit that makes for
the success of our country. And if all the industries of the United
States will have that same spirit, there will be no question as to our
ability to mobilize the resources of this country and carry this war
to a successful conclusion. Good sense, common sense, vision, the
judgment of large-minded men—those are the things that must char-
acterize us if we are to carry on this great venture. We must not
work singly and alone, for selfish ends, in the hope of reaping rich
rewards which will distinguish us merely as men who are in industry
as makers of money. We must work as the men that the papers said
landed in Europe yesterday will work. We must work in companies

BLUEPRINT

TOO

LARGE

FOR

FILMING

in bat-al*l*ions, in regiments, and we must have in our
103 & 104 minds the purpose that we are going to march forward to victory, victory not for ourselves but victory for the country that is dearer to us than anything we have except our own families. This war is not a war of a day. It is not a war upon which we entered lightly. It is not a war in which any man, no matter how old he is, no matter what his resources may be, will not be compelled to play his part. We are the greatest business nation on earth, and therefore we must look to the business men of the country to lead our people in spirit. And I think that the word that comes out from this gathering will be an inspiration to the people of the country.

The Matthew Addy Company Analysis Cost of Coal Sales, January 11, 1917, to March 31, 1920.

Letter-head of Frank C. Dechebach, Certified Public Accountant, Traction Building, Cincinnati.

May 17, 1920.

To the President and Directors of the Matthew Addy Co., Cincinnati, Ohio.

GENTLEMEN: This is to certify that we have made an examination of the cost of coal sales of your company for the period, January 1, 1917, to March 31, 1920, and that the data contained in the attached schedules, in our opinion, correctly set forth the monthly costs for the period covered. Respectfully submitted, Frank C. Deckebach, Certified Public Accountant.

(Here follows statement of tonnage, marked pages 105-110.)

111 & 112

1920.		Head office.		Chicago office.				
		Direct expenses.	Proportion of overhead expense.	Direct expenses.	Proportion of overhead expense.	Total expense.	Coal tonnage.	Cost of coal sales in cents per ton per month.
January—Coal Tonnage—								
Head Office	32,573.00							
Chicago	2,047.00							
	34,620.00	4,317.21	1,905.59	451.74	119.69	6,794.23	34,620	.1962
February—Coal Tonnage—								
Head Office	42,660.00							
Chicago	1,237.00							
	43,897.00	4,807.87	1,844.51	490.88	53.52	7,196.68	43,897	.1640
March—Coal Tonnage—								
Head Office	53,028.00							
Chicago	2,573.00							
	55,601.00	6,854.06	4,527.99	406.89	113.78	11,902.72	55,601	.2141
		15,979.14	8,278.09	1,349.51	286.99	25,893.73	134,118	.1930 for 3 Months.

113 & 114

CERTIFICATE OF CLERK.

UNITED STATES

vs.

BENJAMIN N. FORD.

I, B. E. Dilley, Clerk of the District Court of the United States for the Southern District of Ohio, do hereby certify that the foregoing pages, numbered 1 to 112 inclusive, contain a true and correct copy of those portions of the record and proceedings indicated in the præcipe for record, filed November 26, 1920 (found on page 90 hereof) as the same appear of record and on file in the office of the clerk of said court in the above entitled cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the city of Cincinnati, Ohio, this 15th day of December, 1920. B. E. Dilley, Clerk, by Harry F. Rabe, Deputy. (Seal.)

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

APPEARANCE OF COUNSEL.

[Filed Dec. 22, 1920.]

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error. Nelson B. Cramer.

STIPULATION FOR ADDITION TO RECORD.

[Filed Dec. 22, 1920.]

It is hereby agreed and stipulated between the parties that additional page No. 28*a* containing transcript of verdict and the sentence herein may be inserted in the printed record heretofore filed. R. T. Dickerson, Asst. U. S. Atty. Maxwell & Ramsey, for Plaintiff in Error.

115

JUDGMENT.

[Filed May 4, 1922.]

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion (Filed May 4, 1922).

116 **ORDER APPROVING STIPULATION.**

[Filed Jan. 6, 1921.]

Ordered that the stipulation of the parties for inserting in the printed record an additional page No. 28*a* be and is approved.

CAUSE ARGUED IN PART.

(March 7, 1922—Before Knappen, Denison, and Donahue, C. JJ.)

These causes are argued together by Mr. Joseph S. Graydon for the plaintiffs in error and are continued until tomorrow for further argument.

FURTHER ARGUED AND SUBMITTED.

[March 8, 1922.]

These causes are further argued by Mr. Joseph S. Graydon and Mr. Julius R. Samuels for the plaintiffs in error and by Mr. Thomas H. Morrow, Assistant United States Attorney, for the defendant in error and are submitted to the Court.

117 [Title omitted.]

OPINION.

[Filed May 4, 1922.]

Submitted March 8, 1922. Decided May 4, 1922.

Before Knappen, Denison, and Donahue, Circuit Judges.

KNAPPEN, *Circuit Judge:* The Lever Act was approved and took effect August 10, 1917, (40 Stat., Ch. 53, p. 276). Its title declares it "an act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel." By Sec. 25 the President of the United States was authorized and empowered "whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation

of and to regulate the method of production, sale, shipment,
118 distribution, apportionment and storage thereof among dealers and consumers, domestic or foreign," etc. Subdivision 17 of that section penalizes the violation of or refusal to conform to the regulations provided for in the section, with knowledge that they have been so prescribed. On August 23, 1917, the President adopted a series of regulations as to prices and margins to be in force "pending further investigation or determination thereof by the President." The first of these regulations defined a coal jobber as a person (or other agency) "who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, on through his own vehicle, dock, trestle or yard." Regulation No. 2 forbids a jobber, for the buying and selling of bituminous coal, to add to his purchase price a gross margin in excess of 15 cents per ton. Paragraph 16 of Sec. 25 provides that the maximum price fixed and published (by the Trade Commission) shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the Commission; and on October 6, 1917, the fuel administrator made a regulation that bona fide contracts relating to bituminous coal made before the President's proclamation of August 21, 1917, should not be affected "by these proclamations."

It is conceded or established by verdict that the Matthew Addy Company was, at the time of the transactions complained of, a corporation conducting at Cincinnati, Ohio, the business of a coal jobber, as defined in the President's regulation; that Benjamin N. Ford was vice-president, and in such capacity had control and direction of the activities and contracts of the Matthew Addy Company, so far as they related to the conduct of the business as a coal jobber, and that each plaintiff in error knew of the regulation fixing the "gross margin" at 15 cents per ton. The corporation (cause No. 3517) and Ford (No. 3516) were separately indicted for making, subsequent to August 23, 1917, various specific sales of coal at a price which "included a profit or gross margin" to the corporation of 25 cents per ton, the corporation having no contract with the purchaser made in good faith prior to August 23, 1917, and with knowledge on the part of the respective defendants that such "profit or gross margin of 25 cents per ton" was in excess of the "profit or gross margin of 15 cents per ton" permitted, by the executive order and regulations referred to, to be added to the purchase price paid by the jobber. The corporation was convicted upon 13 counts of the indictment against it;

Ford was convicted upon 7 counts of the indictment against
119 him. In the case of each count in each indictment on which conviction was had it was either admitted or established that the sales were made at a gross margin of 25 cents in excess of the purchase price to the jobber; and that on August 23, 1917, the corporation had no contract for the sales in question. It appeared, however, that all the coal covered by the various counts had been purchased by the corporation previous to August 10, 1917, when the Lever Act took effect. The two cases were tried together, and were

argued together in this court. In each the questions presented for review are the same.

1. Plaintiffs in error contend that inasmuch as the coal in question was bought prior to the President's order of August 23rd and the passage of the Lever Act (August 10th), and as the executive order allowed a margin of 15 cents per ton for the combined "buying and selling of bituminous coal," the penal provisions of Sec. 15 do not apply; that on August 21st the President had provisionally fixed prices of coal both at the mines and in the hands of middlemen and retailers, based upon the cost of production, and regarded as not only just fair and liberal; that the buying and selling amounted to a single transaction, and that to so construe the act as to cover a purchase previous to the executive order and the act would be contrary to the intent of the regulations, and would in given cases attribute to the President an intention to limit the jobber to a gross margin which might well be less than the expense incurred by him in the purchase thereof. This conclusion is thought to be confirmed by certain rulings in the fuel administrator's order of October 6, 1917, which are thought to indicate that it was not at that subsequent date considered an offense for a jobber who had purchased coal prior to August 23rd to sell it at any price obtainable. Plaintiffs in error invoke the proposition that penal laws are to be strictly construed, and should not be regarded retroactive unless such intention is clear.

It seems plain that the President's order of August 23rd should not be construed as excluding from its operation coal previously bought. Neither the statute nor the regulations were ordinary legislation. That they were designed to meet a real emergency is shown not only by the title of the act, but by the preamble, which asserts that the measures provided thereby for conserving the supply of food products, fuel, etc., the establishment of Government control and the issue of regulations and orders provided for, were by reason of the existence of a state of war essential to the national security and defense, for the successful prosecution of the war, and for
120 the maintenance of the army and navy. The act was in terms made effective only until the end of the then existing war. Even ordinary remedial laws, although penal, are not to be so strictly construed as to defeat the obvious legislative intent. Johnson v. So. Pacific R. R. Co., 196 U. S. 1, 17-18. We think the sole enquiry in this connection relates to the intent of the executive in making the order of August 23rd. The order must, we think, be construed as applying to all sales made subsequent to the order, regardless of the time the purchases were made. No limitation in this respect was placed by the statute upon executive action. The authority given was to fix prices of coal wherever and whenever sold. The order of August 21st followed but 10 days after the passage of the statute. It stated that it should be in force pending further investigation. As stated by the trial judge, it was matter of public knowledge, and recognized in certain orders of the fuel administration, that the coal mine output was largely contracted to be sold in advance; that the supply of coal was to a large extent, and in a proper sense, in the hands of jobbers, when the act was passed, and that

unless jobbers' margins with reference to then existing contracts of purchase were regulated it remained open to jobbers to demand what they could get for their coal, and thus carry on the injurious manipulation and private control of the supply which the act was designed to prevent. We have no difficulty in agreeing with the trial judge that the President's orders in question make clear an intention to control and prevent speculation in fuel so far as possible, and not to permit jobbers who already held contracts for mine output to be free from restriction in the disposition of the same.

2. Plaintiffs in error complain that they were not allowed to show that 15 cents per ton added as commission or gross margin to its purchase price results in this case to loss or inadequate compensation. Denial is made of the President's authority to so limit the gross margin as to accomplish that result. In this connection there is a suggestion that the President's authority can only be exercised through the Federal Trade Commission, a subject which will later be considered under another heading. It is further urged that even if the immediate emergency justified the President in fixing jobber's prices, he was subject to the limitations imposed by the act upon the Trade Commission, which (under paragraph 14) was required in fixing maximum producers' prices to "allow the cost of production, including the expense of operation, maintenance, depreciation and depletion," plus "a just and reasonable profit;" paragraph 15 further providing that "in fixing such prices for dealers, the
121 Commission shall allow the cost of the dealer and shall add thereto a just and reasonable sum for his profit in the transaction." In our opinion this contention overlooks the summary nature of the power which we think was conferred on the President, to meet the emergency by making temporary orders which should, so far as possible, save the immediate situation until the Commission should have time and opportunity, through its slower processes, to make more complete investigation of conditions and remedies. It should be conclusively presumed that the President gave the subject all the investigation and consideration which the emergency permitted. It was thus not open to plaintiffs in error to show that in their specific cases the margin allowed was inadequate or resulted in loss.

3. By motion to quash the indictment it is urged that by the Lever Act the President was given no power to fix prices at which coal could be sold, but that such power rested solely in the Trade Commission. Following the broad powers given the President by paragraph 1 of Sec. 25, as quoted in part at the beginning of this opinion, is this express provision: "Said authority and power *may*[1] be exercised by him in each case through the agency of the Federal Trade Commission during the war, or for such part of said time as in his judgment may be necessary."

Plaintiffs in error contend that the word "may" must be construed as "shall," and that this is shown by the asserted "startling innova-

[1]Italics ours.

tion in legislative action," due to the exigencies of the war, found in the authority given the President to fix prices of coal and coke and to establish rules and regulations, etc., as contained in the earlier part of the act, as well as in the provisions relating to compensation for the use of plants and businesses requisitioned, to the designation by the President of an agency to which the producers shall sell their products, etc., to procedure by the Trade Commission in enquiring into the cost of producing coal and coke, and in the requirement that the Commission, in fixing maximum prices, shall allow the cost of production or service and add thereto a just and reasonable sum for the profit in the transaction.

We are unable to agree with this contention. The district judge, in a brief but comprehensive opinion (263 Fed. 451), held that the word "may" is merely permissive; that the President was by the first paragraph of the section empowered, not required, to exercise his authority through the Commission in each instance; and that such intention was otherwise clear from the context. In this opinion we fully concur.

122 Nor do we think there was error in refusing defendants' request to charge that defendants were not liable unless the 25 cents per ton, added by them to the purchase price of $3.25 per ton, included a profit (after the deduction of all costs and expenses) in excess of 15 cents per ton, and in charging that "profit" means the same as "gross margin," viz.: the difference between the purchase price and the selling price.

4. The constitutionality of Sec. 25 of the act is vigorously assailed on several grounds, the first being that it deprives plaintiffs in error of their property without due process of law. The specific criticisms are that the law is not clear and definite, and that no notice and hearing upon the making of executive orders is provided for. The first criticism is plainly without merit. Nothing could well be more clear and definite than the plain inhibition against making the selling price more than 15 cents per ton higher than the purchase price. The case is obviously not within the reasoning of the Cohen case (255 U. S. 81, 89), which held Sec. 4 of the act invalid; and the instant case is not affected by that decision. As to the second criticism. While under ordinary conditions notice and hearing would be conditions precedent to the making of an order of this kind, we agree with the court below (265 Fed. 424) that due process of law is not to be tested by form of procedure merely, that public danger warrants the substitution of executive processes for judicial process (Mayer v. Peabody, 212 U. S. 78, 84); and that under the war conditions then existing, and as indicated by the preamble of the act, the fixing of prices in industries so vital to the prosecution of the war as food and fuel was not the deprivation of due process of law, but was within the power given to Congress by Art. I, Sec. 8 of the Constitution, to make all laws necessary and proper for carrying into execution the war powers expressly enumerated. Our conclusion that Sec. 25 of the Lever Act is valid is confirmed by the many recent decisions of the Supreme Court sustaining the exercise of war powers; as in the McKinley case (249 U. S. 397, 398), where was sustained a regula-

tion of the Secretary of War, made under the authority of Congress, forbidding the keeping of houses of ill fame within a certain distance of military camps; the War Time Prohibition case (251 U. S. 146, 160), holding that the exercise of the power to prohibit the liquor traffic as a means of increasing war efficiency was within the war power of Congress; Ruppert v. Caffey (251 U. S. 264, 279, 283, 301), which sustained the prohibition against liquors containing one-half of one per cent. of alcohol, even though not in fact in-
123 toxicating; the Selective Draft cases (245 U. S. 366, 377); the Espionage cases (Schenck v. U. S., 249 U. S. 47; Frohwerk v. United States, 249 U. S. 204; Debs v. United States, 249 U. S. 211). In several of the cases cited the Lever Act is referred to, and, to say the least, without apparent question of its validity generally.

The section is further criticized as violating Arts. I, II and III of the Federal Constitution, by attempting to delegate legislative and judicial powers to the President, the fuel administrator and the Federal Trade Commission. We are unable to recognize any delegation of judicial power. In our opinion the delegation of power to make reasonable rules and regulations for the control of the food and fuel supply did not violate the prohibition against delegation of legislative power. Buttfield v. Stranahan, 192 U. S. 470, 494; Union Bridge Co. v. United States, 204 U. S. 364, 377; St. Louis, Etc., Ry. Co. v. Taylor, 210 U. S. 281; McKinley v. United States, supra.

We see no merit in the suggestion that the section is an abuse of the powers given Congress to provide for the national security and defense, or in the contention that the section violates the 10th amendment by interfering with the rights of the respective states as to regulation of industries within the states.

We have not discussed all the arguments adduced by counsel for plaintiffs in error in support of their contentions. We have, however, given them full consideration, and have reached the conclusion that no error was committed by the court below in the respects complained of, and that its judgment should be affirmed.

124 United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Benjamin N. Ford vs. United States of America, No. 3516, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 29th day of May, A. D. 1922. Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

125 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Benjamin N. Ford is plaintiff in error, and The United States of America is defendant in error, No. 3516, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
126 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, ss.

I, Arthur B. Mussman, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the sixth day of November, A. D. 1922 there was filed in my office a stipulation in the above entitled case in the following words, to wit:

United States Circuit Court of Appeals for the Sixth Circuit, ss.

BENJAMIN N. FORD, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

It is hereby stipulated by and between counsel for plaintiff in error and defendant in error that the transcript of the record of this Court in the above entitled cause, filed in the Supreme Court of the United States with a petition for writ of certiorari may be considered as a return by the clerk of this Court to the writ of certiorari issued

out of the Supreme Court of the United States on the 26th day of October 1922, directing this Court to certify to said Court the record and proceedings herein. Benjamin N. Ford, by Julius R. Samuels, Counsel. United States of America, by Jas. M. Beck, per Thos. H. Morrow, Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, Ohio, in said circuit this sixth day of November, A. D. 1922. Arthur B. Mussman, Clerk United States Circuit Court of Appeals for the Sixth Circuit. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.]

127 [Endorsed:] File No. 29,045. Supreme Court of the United States, October Term, 1922. No. 495. Benjamin N. Ford vs. The United States of America. Writ of Certiorari. Filed Nov. 6, 1922. Arthur B. Mussman, Clerk.

[Endorsed:] File No. 29,045. Supreme Court U. S., October Term, 1922. Term No. 495. Benjamin N. Ford, Petitioner, vs. The United States. Writ of certiorari and return. Filed Nov. 9, 1922.